

VERBATIM ¹RECORD OF TRIAL ²

(and accompanying papers)

of

MANNING, Bradley E.

(Name: Last, First, Middle Initial)

[REDACTED]

(Social Security Number)

PFC/E-3

(Rank)

Headquarters and

Headquarters Company,

United States Army Garrison

(Unit/Command Name)

U.S. Army

(Branch of Service)

Fort Myer, VA 22211

(Station or Ship)

By

GENERALCOURT-MARTIAL

Convened by

Commander

(Title of Convening Authority)

UNITED STATES ARMY MILITARY DISTRICT OF WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Fort Meade, MD

(Place or Places of Trial)

on

see below

(Date or Dates of Trial)

Date or Dates of Trial:

23 February 2012, 15-16 March 2012, 24-26 April 2012, 6-8 June 2012, 25 June 2012, 16-19 July 2012, 28-30 August 2012, 2 October 2012, 12 October 2012, 17-18 October 2012, 7-8 November 2012, 27 November - 2 December 2012, 5-7 December 2012, 10-11 December 2012, 8-9 January 2013, 16 January 2013, 26 February - 1 March 2013, 8 March 2013, 10 April 2013, 7-8 May 2013, 21 May 2013, 3-5 June 2013, 10-12 June 2013, 17-18 June 2013, 25-28 June 2013, 1-2 July 2013, 8-10 July 2013, 15 July 2013, 18-19 July 2013, 25-26 July 2013, 28 July - 2 August 2013, 5-9 August 2013, 12-14 August 2013, 16 August 2013, and 19-21 August 2013.

¹ Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

² See inside back cover for instructions as to preparation and arrangement.

1 or sensitive information is not as broad as intelligence. The nature
2 of the charges facing the accused encompass much more than 380-5
3 punish. So, we would argue that 380-5 is not--that the 134 offense
4 should not have been charged as a 92.

5 MJ: So, am I understanding your argument that that classified
6 and sensitive information is a subset of intelligence?

7 ATC[CPT WHYTE]: That is correct, Your Honor.

8 MJ: So, for the classified and sensitive information subset
9 does Article 90--does AR 380-5 govern that?

10 ATC[CPT WHYTE]: The United States would argue that is a
11 different *mens rea* of the, "wanton" for the 134. Again, "wanton"
12 being the reckless as opposed to knowing, willfully, or negligently.

13 MJ: Is there case on point in either direction to your
14 knowledge that discusses the, I guess, using a different intent than
15 what is in a punitive regulation under article 134.

16 ATC[CPT WHYTE]: The United States is not aware of any case law,
17 ma'am.

18 MJ: So, the distinctions that between AR 380-5, according to
19 the Government, are the wanton intent, the broader definition of
20 intelligence, is there anything else?

21 ATC[CPT WHYTE]: And also, as the 134 offense is written, the
22 additional element that the accused knew that intelligence published
23 on the Internet is accessible to the enemy.

1 MJ: Okay.

2 ATC[CPT WHYTE]: Subject to your questions, ma'am.

3 MJ: I think I just asked them, thank you.

4 ATC[CPT WHYTE]: Thank you.

5 MJ: Mr. Coombs?

6 CDC[MR. COOMBS]: Yes, ma'am, briefly, just addressing a couple
7 of things. The legislative intent, absent legislative intent you
8 obviously look to the plain meaning and the language within 104. So,
9 the defense's position is, the all-encompassing language used by
10 Congress clearly indicates their intent.

11 MJ: Didn't *Anderson* say exactly the opposite?

12 CDC[MR. COOMBS]: Only with regards to covering information that
13 is related to the type of offense. So, *Anderson's* issue was not
14 whether or not 134 was dealing with providing information to the
15 enemy, it was providing information to an unauthorized person. It is
16 not at all a surprise that *Anderson*, in the opinion of *Anderson* said,
17 "You do not have preemption there", because Article 104 is only
18 dealing with providing information to the enemy whether communicating
19 or giving intelligence to. It has no place, nor does it have any
20 reach with regards to an unauthorized disclosures[sic] to individuals
21 who are not the enemy.

22 MJ: But, is the specification at issue here is Specification 1
23 of Charge II, as I am reading it they are saying that the accused had

1 knowledge that the intelligence is accessible to the enemy but is the
2 punishing the wanton disclosure to everybody?

3 CDC[MR. COOMBS]: For a difference between a 104 offense, or are
4 you----

5 MJ: Yeah, if 104 is geared toward communicating with enemy----

6 CDC[MR. COOMBS]: Right.

7 MJ: ----And maybe I am misreading the specifications, I am
8 reading this Specification 1 of Charge II, it is charging him with
9 wanton disclosure of information on the Internet knowing that the
10 enemy can get it.

11 CDC[MR. COOMBS]: And that added language, that grafting of the
12 language then would fall, at least in our position, that is what
13 makes it fall within the preemption doctrine for Article 104. Had
14 they not grafted that language on then you have an unauthorized
15 disclosure unrelated to the enemy so you do not have a preemption
16 issue, then you would have whether or not Article 92 should cover it.

17 MJ: Okay.

18 CDC[MR. COOMBS]: With regards to the other distinction that the
19 government has pointed out, the fact that the 104 offense has
20 elements in addition to the 134, or vice versa, the 104 having
21 elements in addition to 134 is entirely irrelevant. The whole point
22 of the preemption doctrine is to prevent the government from using
23 the 134 offense to basically establish a new type of offense that is

1 already covered from the enumerated articles. And, the fact that the
2 134 offense has some additional elements that 104 offense has is also
3 entirely relevant. If the 134 offense, the fact that it had
4 prejudicial to order and discipline or service discrediting, if that
5 mattered then you would never have a preemption issue with a 134
6 offense because obviously would always have those additional
7 elements. There has been some case law and discussion as to whether
8 or not those elements are implicitly within the enumerated offenses
9 but nothing controlling to make that a determination. So, if the
10 government's position was correct that all it took was that
11 additional element for the 134, the clause one and two language, then
12 you would never have a preemption, so that cannot be true.

13 MJ: Is the defense aware, have there been any preemption cases
14 following *United States v. Jones*?

15 CDC[MR. COOMBS]: I am not, ma'am. The *Jones* case obviously
16 impacts what is a lesser included offense. What I have seen since
17 *Jones*, and that goes into a----

18 MJ: It is interesting that the dissent in *Jones* said that *Jones*
19 does away with the preemption doctrine.

20 CDC[MR. COOMBS]: Well, and it is the dissent.

21 MJ: I do not know.

22 CDC[MR. COOMBS]: But, the cases after that, obviously they find
23 lesser included offenses. Really it becomes more of a discussion of

1 whether or not you do like the blockers--*Blockberger/Teters* test. I
2 think that impacts what is an LIO but I do not think that impacts the
3 preemption. And plus, that would be problematic from the defense's
4 perspective because Congress, when they looked at--well, not
5 Congress, excuse me, the Supreme Court, when they look at 134 under
6 *Parker v. Levy*, the main reason that they believed that 134 is
7 constitutional was how we were implementing 134 and the fact that
8 there were limitations placed upon it even within the Manual to not
9 allow 134 to be used as the catchall creative charging decision of
10 the government where there would be no due process notice to the
11 accused. So, I think that the limitations that we have within the
12 Manual show that preemption still is alive and kicking until, I
13 guess, CAAF says otherwise. The additional aspect that the
14 government points to, ma'am, of the fact that the 134 offense
15 requires publication of information while the 104 offense does not
16 also seems to be, at least to the defense, manufacturing a
17 distinction where none truly exists. Both of them were premised, and
18 you look at both offenses, they are premised on the idea that the
19 information was provided to an unauthorized person, WikiLeaks, or
20 source, and that that information then was made available on the
21 Internet and accessible to the enemy. So, both offenses are going
22 after the exact same conduct. And, the fact that the government is
23 saying, "Well, for the 134, we have to prove that it was published

1 and accessible while we do not have to prove that for the 104
2 offense", is manufacturing a distinction where none really exists.

3 So, subject to your questions, ma'am.

4 MJ: All right, thank you.

5 CDC[MR. COOMBS]: Thank you.

6 MJ: Yes?

7 ATC[CPT WHYTE]: Your Honor, with your permission, the United
8 States would like to read what, "sensitive information", is from 380-
9 5, if you do not mind, Your Honor. It is section 5-19. "Sensitive
10 information is defined in paragraph (a) as any information the loss,
11 misuse, or unauthorized access to, or modification of which could
12 adversely affect the national interest or the conduct of federal
13 programs or the privacy to which individuals are entitled under
14 section 552a of Title 5 U.S.C., the Privacy Act, of which has not
15 been specifically authorized under criteria established by an
16 executive order or an act of Congress, to be kept secret in the
17 interest of national defense or foreign policy."

18 MJ: So, what is the difference between that and intelligence?

19 ATC[CPT WHYTE]: The definition of intelligence in the Bench
20 Book is just that the information is at least true, in part, and that
21 it is helpful to the enemy. So, that encompasses more than sensitive
22 information.

1 MJ: All right. All right, I believe your Bench Book definition
2 then would be coming from Article 104. The definition is in the
3 Manual itself, is that correct?

4 ATC[CPT WHYTE]: Yes, ma'am.

5 MJ: Which says, "Intelligence imports that the information
6 conveyed is true or implies the truth, at least in part." That is
7 not really a definition, but--all right, so it is the government
8 position that intelligence is information beyond classified and
9 sensitive information?

10 ATC[CPT WHYTE]: That is correct, Your Honor.

11 MJ: So, just for example, in this kind of--in the
12 specification, what type of information are you talking--in the
13 government's theory, falls under this specification that is not
14 classified or sensitive? Give me an example.

15 ATC[CPT WHYTE]: The United States would probably require a few
16 minutes to provide that example.

17 MJ: All right. Why don't we do this, let's recess for about 10
18 minutes. Does that give you enough time to confer on that issue?
19 And then what we are going to do is come on briefly, you can answer
20 my question and then, absent any disagreements, it would be a good
21 time probably to break for lunch. Is 10 minutes sufficient for you?

22 ATC[CPT WHYTE]: Yes, ma'am.

1 MJ: All right, do you just want to break for lunch and then
2 give me the answer when we come back on the record?
3 TC[MAJ FEIN]: We can do that as well, ma'am.
4 MJ: Okay, that is probably easier. It is--how about 1330, does
5 that work for both sides?
6 CDC[MR. COOMBS]: It does for the defense, ma'am.
7 TC[MAJ FEIN]: Yes, ma'am.
8 MJ: All right, the court's in recess until 1330.
9 **[The Article 39(a) session recessed at 1213, 25 April 2012.]**
10 **[The Article 39(a) session was called to order at 1337, 25 April**
11 **2012.]**
12 MJ: This Article 39(a) session is called to order. All parties
13 present when the court last recessed are again present in court.
14 All right, Government, do you have any response for me?
15 ATC[CPT WHYTE]: Yes, ma'am. In response to your question about
16 what information falls outside classified or sensitive and is still
17 in intelligence, if Your Honor would look at Specification 2 of
18 Charge II, the video that is subject to that specification satisfies
19 the Court's question.
20 MJ: Okay, what video?
21 ATC[CPT WHYTE]: I am sorry?
22 MJ: What video?

1 ATC[CPT WHYTE]: The 12 July 07, engagement zone video, the
2 Apache video.

3 MJ: All right, for the record again, remember I have not seen
4 the evidence in the case, what is that?

5 ATC[CPT WHYTE]: That is one of the videos that was compromised.
6 Your Honor, may I have one second, please?

7 MJ: Yes, please.

8 ATC[CPT WHYTE]: Your Honor, may I defer to another counsel?

9 MJ: Certainly.

10 TC[MAJ FEIN]: Your Honor, the video that is the subject of
11 Specification 2 of Charge II is a unclassified video that the accused
12 is charged with removing from the SIPRNET and transmitting it to an
13 unauthorized person in violation of 18 U.S.C. 793(e). It is
14 unclassified and it does not contain sensitive information as per the
15 definition in 380-5.

16 MJ: Now, is that the only intelligence--is that the only piece
17 of information that you are charging under Specification 1 of Charge
18 II or are you charging additional things under that specification?

19 TC[MAJ FEIN]: Ma'am, there is other information that could also
20 fall under that, but that is the only piece of information that falls
21 in the other specifications under Charge II. Your Honor, I guess,
22 let me back up. The government's position with Specification 1 of
23 Charge II is that the government's position originally, and still

1 here today, of course depending on the Court's ruling, is that all of
2 the information that has been charged or compromised falls under
3 Specification 2, excuse me, Specification 1 of Charge II.

4 MJ: Okay, that is where I was confused. Not just that piece,
5 that's just the intelligence piece, that is not the rest of it.

6 TC[MAJ FEIN]: Yes, Your Honor. So, all of the information that
7 is at play in this case is being charged under Specification 1 of
8 Charge II. To simply answer your question, that video is the subject
9 of Specification 2 of Charge II would be information that falls
10 outside of sensitive or classified under the definitions in 380-5.
11 But, because the government maintains that 380-5, that that one
12 provision of 1-21 does not preempt the 134 offense. All the
13 information is being considered as part of Specification 1 of Charge
14 II.

15 MJ: All right, thank you.

16 Mr. Coombs, you stood it up?

17 CDC[MR. COOMBS]: Yes, ma'am. Just real briefly on that point,
18 if the video being pointed out by the government as an example of
19 intelligence apparently that does not fall within classified or
20 sensitive, the defense will provide the court a review that the
21 government gave to it by an individual who looked at the video,
22 apparently, to say it was not classified but it should have been

1 unclassified, according to this individual. And secondly, that it
2 was, in fact, sensitive.

3 MJ: Is that individual a classification authority?

4 CDC[MR. COOMBS]: It was the individual which the government
5 used in order to, apparently, do the classification review of the
6 video. He is not an original classification authority, no.

7 TC[MAJ FEIN]: Your Honor, the individual is a--or, one was/is
8 an Army captain who did a preliminary classification for a command
9 who is not an OCA. That video they went through the proper
10 processes. That was part of it at the lower level. Once it got up
11 to the appropriate OCA, the OCA determined that it was not
12 unclassified. And, the sensitive information, as defined by 380-5,
13 it is not contain that information either.

14 CDC[MR. COOMBS]: And, we have not received then the original
15 classification authority's review of that, or at least I am not aware
16 of receiving that. But even aside, then if there is a distinction
17 between classified, sensitive, and intelligence, which the defense
18 would say there is not, everything that the government has charged is
19 classified or sensitive in some way, manner, or form and should fall
20 under 380-5.

21 MJ: Major Fein, did this classification review occur after the
22 incident?

23 TC[MAJ FEIN]: Yes, Your Honor, it did.

1 MJ: So, if this information was on the SIPRNET, is information
2 on the SIPRNET presumed classified?

3 TC[MAJ FEIN]: Your Honor, it absolutely is presumed to be
4 classified, but to go forward, if Your Honor looks at the charge
5 sheet, looks at the different specifications, certain specifications
6 have been alleged as classified information, other specifications
7 have not. They were written that way because some information was
8 classified as determined by Original Classification Authority, other
9 information was not. So, for Specification 2 of Charge II the
10 government did not allege that is classified information, it is just
11 government information. It is information, the video, versus other
12 specifications, similar 793 violations where it does say, "classified
13 information". So, what government has essentially done is added
14 almost an extra element, at least a factual element, that we then
15 have to prove that the information is properly classified or is
16 classified for the specifications, not for Specification 2 of Charge
17 II.

18 MJ: I guess when I am looking at this, for Specification 1 of
19 Charge II, when you are looking at the issue of whether Article 134
20 can be charged versus 92, specifically the punitive regulation, what
21 is the government's--if that video--would that video fall within the
22 AR 380-5?

1 TC[MAJ FEIN]: Well, Your Honor, to answer your question, no,
2 because it is not classified information, nor is it sensitive
3 information as per the definition Captain Whyte read write a record
4 dealing with the different federal acts to define sensitive
5 information, but the government maintains none of this information is
6 preempted or the specifications are preempted by 380-5, mostly
7 because that provision, 1-21, is simply a notice and a general
8 provision, it does not actually prohibit conduct. The regulation is
9 punitive, there are specific provisions within the regulation after
10 the first chapter, which is just an introductory chapter. In fact,
11 under paragraph 1-21, section (b), right after (a) that the defense
12 cites, the reg specifically talks about that "sanctions can include",
13 and gives the entire buffet of options that the command would have to
14 provide sanctions. Included with that is to charge violations of the
15 UCMJ, of that Code or other applicable criminal law.

16 MJ: So, is it the government's position that paragraph 1-21 is
17 not a punitive provision, it is a notice provision?

18 TC[MAJ FEIN]: Yes, ma'am. That is the government's position.

19 MJ: And, what--I notice--what other provisions in that
20 regulation are punitive?

21 TC[MAJ FEIN]: Well Your Honor, for instance--may I have a
22 moment?

23 MJ: Yes, please.

1 [Pause]

2 TC[MAJ FEIN]: So, Your Honor, just referencing the charge sheet
3 alone, Specification 5 of Charge III, paragraph 7-4 is a punitive
4 provision. Just because--the government contends just because a
5 regulation is punitive in nature does not mean all of the words in
6 the regulation are punitive. Typically, for instance, the
7 regulations, the way they are written, paragraph--excuse me, chapter
8 1, background chapter, speaks about the different types--what the
9 regulation is about, authorities, and then the prohibitive conduct,
10 the specific conduct that is intended to be prohibitive and allow the
11 government to hold the Soldier accountable punitively are listed
12 later in the regulation. So, that type of conduct such as where you
13 can store material, where you can't, how to handle, how not to, is
14 later addressed to the regulation.

15 MJ: Where is it in the regulation say that chapter 7--excuse
16 me, paragraph 7-4 in Army Regulation 380-5 is punitive?

17 TC[MAJ FEIN]: And, unfortunately 380-5, written in 2000,
18 doesn't actually go through each paragraph such as Army Regulation
19 25-2, which has bold paragraphs and has the language, it says if it
20 is bolded, punitive. So, we resort to the interpretation of the
21 regulation on the specific conduct that has been--that prohibits--or
22 excuse me, specific prohibitions of conduct that the regulation
23 addresses. That conduct is what is punitive. Our interpretation of

1 paragraph 1-21 is that it simply sets out that this is the purpose of
2 the reg and this type of conduct could be--someone could be
3 accountable under the UCMJ or other law. The same reg, after
4 paragraph--or excuse me, chapter 1, then goes further to specify what
5 type of conduct that would fall under the 1-21 standard. And, this
6 is evident, Your Honor, even if you go to the--excuse me, paragraph
7 10-10 which actually discusses negligence and specifically lays out
8 what type of negligence and talks about that certain types of
9 negligence is, or could be, held accountable, a Soldier could be,
10 under the UCMJ. Again, it is a background paragraph and then it
11 specifies. The reg, unlike most regulations, this also cites and it
12 provides examples of the different UCMJ and federal law that a
13 Soldier could be charged with for violating different provisions of
14 the regulation. If this regulation was written to cover the entire
15 playing field of what is listed and 1-21, then the entire remainder
16 of regulation would not even need to be there because that misconduct
17 captures everything else in the reg. But rather, the regulation is
18 written to specify certain conduct that falls under this larger
19 background paragraph and prohibits that.

20 MJ: So, let me just understand the government's position. The
21 government's position is Paragraph 1-21 is not a punitive provision?

22 TC[MAJ FEIN]: Yes, Your Honor.

1 MJ: So, someone who willfully, negligently and--I do not have
2 the paragraph in front of me, whatever the other intent was there,
3 discloses classified information to unauthorized persons, that is not
4 a punitive reg in that respect?

5 TC[MAJ FEIN]: Yes, Your Honor, that there is other law as
6 referenced in sub b), right after that portion, that can hold a
7 Soldier accountable for those types of violations. It is simply
8 laying out the background and then says it could be charged and then
9 certain acts, such as that you just listed, are covered in 380-5
10 later and some are not. For instance, compromising classified
11 information to someone not authorized. The reg specifically lists 18
12 U.S.C. 793; it also lists 18 U.S.C. 794; and, UCMJ Article 106(a) in
13 the reg as examples of what Soldiers can be charged with.

14 MJ: I guess what I am asking you is, for purposes of Article
15 92, what is the government's position with respect to AR 380-5, in
16 paragraph 1-21? Does that make--does paragraph 1-21 make the conduct
17 it describes punishable under Article 92 as a punitive regulation?

18 TC[MAJ FEIN]: No, Your Honor, the government's position is it
19 does not.

20 MJ: Does any other provision in that regulation do that?

21 TC[MAJ FEIN]: Yes, Your Honor.

22 MJ: All right, I guess where I am going with this is I am
23 looking, and again this is not an issue that has been raised, but

1 looking at Specification 5 of Charge III, it talks about Paragraph 7-
2 4. Now, if paragraph 1-21 is not Article 92 punitive background for
3 that, what is?

4 TC[MAJ FEIN]: I am sorry, ma'am, could you----

5 MJ: What makes that paragraph--a violation of that paragraph, a
6 violation of Article 92 if paragraph 1-21 does not?

7 TC[MAJ FEIN]: Ma'am----

8 MJ: And I am hitting you with this, you don't need to answer
9 this question right now. We can go ahead and move on. But, I would
10 like that answered if we could. We could take a brief recess before
11 we ultimately recess, then I would like the government's position on
12 that.

13 TC[MAJ FEIN]: Yes, Your Honor.

14 MJ: Yes?

15 CDC[MR. COOMBS]: Ma'am, the defense can answer that question
16 for you. The *United States v. McGinnis* at 35 MJ 149 CMA opinion,
17 clearly indicates that 380-5 is a punitive regulation. In that
18 case, the issue is whether or not 793 was preempted by Article 92 and
19 the case was cited in the defense' motion. Basically, the defense'
20 position on this is, you can have unauthorized disclosure that is a
21 violation of the regulation does not amount to information that could
22 be used to the injury of the United States or to the advantage of a
23 foreign nation. So, in other words you could have an Article 92

1 violation but it does not rise to the level of 18 U.S.C. 793. So,
2 the government could charge the Article 92 violation if they believe
3 that the disclosure was such that it rised--risen--rose to a level of
4 something that could cause damage to the United States or aid a
5 foreign nation, then they would, under clause 3, bring in 18 U.S.C.
6 793(e). The regulation puts the Soldier on notice that they can be
7 in violation of regulation and also, depending upon the nature of
8 their conduct, could be in the violation of Federal code, therefore,
9 the 793/794, that Major Fein cites. In addition, depending upon the
10 nature of your activity it could be an Article 106 or an Article 104
11 depending on what you did.

12 MJ: So, is it the defense position, with respect to the
13 Article--or, the paragraph 1-21, that that is a punitive provision
14 under Article 92?

15 CDC[MR. COOMBS]: Exactly, ma'am, without a shadow of a doubt.
16 It is a punitive provision. The way it is written is punitive and it
17 gives Soldiers notice of the fact that they could be charged under
18 the UCMJ for a violation of that provision and it kicks you over into
19 other possible violations. So, the government's position here, there
20 will be no case law that supports that position. In fact, the
21 McGinnis opinion is squarely on point with regards to you can have
22 the Article 92 violation. If the government's position were correct,
23 then you would only have, I guess, the ability to charge everything--

1 you wouldn't have the ability to charge and unauthorized disclosure
2 under Article 92, period. You have to do it as a 793 or as they have
3 done here, create an offense under Article 134, which that is just
4 not the case.

5 MJ: All right, thank you Mr. Coombs.

6 CDC[MR. COOMBS]: Thank you, ma'am.

7 MJ: Major Fein, I would like government's position on that as
8 well. We will go ahead and continue on, but we will take a recess
9 later on in the day and then just come back and get that.

10 TC[MAJ FEIN]: Yes, ma'am.

11 MJ: All right, we have got two--we got the defense motion to
12 dismiss The Specification of Charge I for failure to state an
13 offense. Looking at the hour today, what I intend to do is to go
14 through with this motion and then call a recess until tomorrow and we
15 will address the government motion tomorrow. The same schedule, 0900
16 802 conference and 1000 we will go on the record.

17 Is that acceptable to the parties?

18 CDC[MR. COOMBS]: Yes, ma'am.

19 TC[MAJ FEIN]: Yes, ma'am.

20 MJ: All right, Mr. Coombs? For the record, we have the defense
21 motion to dismiss The Specification of Charge I for failure to state
22 an offense and that is Appellate Exhibit 62, and the government
23 response to that motion, which is Appellate Exhibit 63.

1 CDC[MR. COOMBS]: Ma'am, the government has not cited a single
2 case where the accused has been charged with giving intelligence to
3 the enemy under facts similar to this case and that is because there
4 has been no case in the history of military justice where an accused
5 has been prosecuted in circumstances even remotely similar to this.
6 For that very reason, the court should have pause in allowing the
7 government to proceed under a very expansive theory that they have
8 adopted as far as what is, "indirectly" and what is, "knowingly".

9 The defense requests that the court dismiss the Article 104
10 offense for two reasons, first, the government has failed to allege
11 the requisite intent, that is the intent to provide information to
12 the enemy. Second, that, in the alternative, if the government's
13 interpretation of, "knowingly", and, "indirectly", how they use those
14 two terms is accepted, then the problem with Article 104 would be
15 that it would not give notice to an accused. It would be
16 unconstitutionally vague under the due process clause and it would
17 limit the free speech rights of Soldiers based upon how the
18 government is interpreting, "knowingly", and, "indirectly" to such an
19 extent that it would be in violation of the First Amendment.

20 MJ: Let me ask you one question on the, "knowingly" mens rea
21 and general intent. Do you agree that Article 104 is not a specific
22 intent crime?

1 CDC[MR. COOMBS]: That is correct, Your Honor. The defense
2 agrees with that. The *Olson* case actually lays out the fact that
3 what you have to show is a general evil intent. The case states
4 that, "To protect the innocent who may commit some act in aiding the
5 enemy inadvertently, accidentally or negligently, then you have to
6 show a general evil intent. Here, the defense's position is that the
7 government must allege that the accused acted with the requisite
8 intent and the intent is to provide intelligence information to the
9 enemy. So, in other words, when they are alleging that he indirectly
10 gave information to the enemy through WikiLeaks, they have to be
11 alleging that he used WikiLeaks for the purpose of giving
12 intelligence to the enemy.

13 MJ: Isn't that specific intent?

14 CDC[MR. COOMBS]: That is the general evil intent that *Olson*
15 requires. It sounds like specific intent but it's designed to
16 protect an accused from being prosecuted under 104 for a negligent
17 act. The *Anderson* case also lays out this distinction [sic]
18 saying that "You have to show the general intent to provide
19 unauthorized disclosure, we are not worried about the intent of that
20 information goes to." *Anderson* says the 104 offense in that case was
21 not problematic because the intent there is to have the information
22 go to the enemy. It is a general evil intent but you still have to
23 show that intent. An example might be, the best way of showing this,

1 if I provide intelligence information to FedEx with the address of
2 the enemy, then when FedEx delivers that to the enemy, that is the
3 "indirectly" providing intelligence to the enemy. I have had the
4 general evil intent of giving that information to the enemy and that
5 is what Article 104 is designed to address, a Soldier who provides
6 information with the general evil intent of getting that to the
7 enemy, not a Soldier who recklessly or negligently provides it. And,
8 even the government themselves in their motion, on page 7, they even
9 agree that negligent disclosures and even grossly negligent
10 disclosures are not subject to punishment under Article 104. And I
11 quote from their language, "This mens rea requirement guards against
12 arbitrary enforcement by establishing that mere negligent disclosures
13 or even wanton disclosures are not subject to prosecution under
14 article 104."

15 MJ: How does, "knowing"--I guess I am looking at, "knowing",
16 and I am looking at the *Morissette* case, the Supreme Court case that
17 talks about, "knowing", establishing an "evil mind".

18 CDC[MR. COOMBS]: Right, the general evil mind that you must
19 establish is that you have had the intent, in this case, if it is
20 charged "indirectly", of providing the information with the intent,
21 the general evil intent, that that information get to the enemy.
22 That is all we are aimed at and that is what you have to be trying to
23 punish. And, the problem is that when you look at the government's

1 theory, both in what they responded to in their bill of particulars
2 and in their nine page motion, they are alleging a pure negligence
3 theory of liability. You are alleging that because PFC Manning had
4 general knowledge that the enemy had access to the Internet and the
5 enemy may go to the WikiLeaks website, by publishing that information
6 or giving that information allegedly to WikiLeaks, he indirectly
7 aided the enemy. They are not alleging that he used WikiLeaks for
8 the purpose of giving the information to the enemy, just the mere
9 knowledge that he had from his training or experience that the enemy
10 uses the Internet. Which really, that would not be dependent on any
11 specialized knowledge. I think most common sense people would know
12 that the enemy may use the Internet but that doesn't subject every
13 disclosure, even every intelligence disclosure or classified
14 disclosure to an Article 104 violation. What if a Soldier decided to
15 post some information on his blog or her blog for, not the purpose of
16 getting it to the enemy, but we could show that the enemy has access
17 to the Internet, therefore has access to your blog if you put
18 information on there, we are going to hit you with an Article 104
19 violation. That would be contrary to what *Olson* says you cannot
20 have. You have to show that general evil intent and what *Anderson*
21 has said, that you have to show the intent--the general evil intent
22 to provide the information to the enemy. But, we know that the
23 government is proceeding on the negligence theory, we know that at

1 page 5 of their motion. They state, "A reasonable Soldier would also
2 understand that you posting intelligence on a website used by the
3 enemy without authority, if the Soldier knew the enemy used the
4 website constitutes indirectly giving intelligence to the enemy."
5 And, that is their theory, a negligence theory of liability. A
6 Soldier who posts intelligence on the Internet knowing the enemy
7 might go to that website has indirectly giving intelligence to the
8 enemy. That is not an Article 104 violation, at the most, that is a
9 unauthorized disclosure where you might, in sentencing, if you could
10 show that the enemy got access to it, that would be in aggravation---
11 factor in aggravation that you negligently put information on the
12 Internet and low and behold, the enemy got it, therefore now this is
13 a more serious Article 92 violation than otherwise might be the case.
14 But, it does not rise to level of, "You put information on the
15 Internet knowing that the enemy may have access to the Internet and
16 therefore you've aided the enemy." That is not what aiding the enemy
17 applies to nor can it apply---

18 MJ: Well, here they are saying the Soldier knew the enemy used
19 the website. Is there a distinction with that?

20 CDC[MR. COOMBS]: Well, their distinction is, and the
21 information that they may provide, is that he had knowledge that the
22 enemy uses the Internet and in particular, there is one document
23 where there is an intelligence document that references the fact

1 that, WikiLeaks and other organizations like that would post
2 information on the Internet, pose a security threat because that
3 information is out, the enemy can have access to that. But, the
4 exact same thing can be said for *The New York Times* or *The Washington*
5 *Post* or any other large publication that frequently publishes
6 intelligence information provided to them.

7 So, for a moment, let us take WikiLeaks out of the equation
8 here and say that what the government is alleging that he provided
9 this information to *The Washington Post* knowing that the enemy reads
10 papers and has access to *The Washington Post* and knowing that the
11 enemy realizes that *The Washington Post* frequently publishes
12 classified information that they obtain. Has the Soldier indirectly
13 aided the enemy if the Soldier gave it to *The Washington Post*? And
14 that is the question because absent some information, ma'am, to
15 suggest that I get into *The Washington Post*, the intent was to get it
16 to the enemy. Thus, the way that you would normally think of,
17 "indirectly", you haven't directly done it, you haven't reached out
18 and directly gave information to the enemy, you have used a
19 intermediary to do so for you. In this case, under my hypothetical,
20 *The Washington Post*, but the same could be said for *The New York*
21 *Times*, WikiLeaks or any other Internet--or even the Soldier's own
22 blog, or perhaps a family member's Facebook page. The aspect of
23 having it on the Internet and being provided somehow notice that now

1 you are subject to a death penalty offense is not the proper
2 standard. The standard has to be showing that general evil intent.
3 And the examples are given, and what the defense has cited in all of
4 its cases--the reason why I say there has been no case even remotely
5 like this, everything shows a Soldier either directly providing
6 intelligence or information to the enemy where it is clear we can see
7 that intent; the Soldier has done it. The, "indirectly", in this
8 instance has to mean using an intermediary for the purpose of giving
9 the information to the enemy. The government quotes that they use
10 the word, "knowingly", but again, by using the word, "knowingly",
11 they really are alleging, "negligently", and that is not a proper
12 theory for Article 104.

13 MJ: Well, I mean that is, they are alleging--the allegation,
14 the Article 134--or, the 104 says, "knowingly".

15 CDC[MR. COOMBS]: Right.

16 MJ: And, that is what the specification says.

17 CDC[MR. COOMBS]: Yes, ma'am.

18 MJ: So, is the, "knowing", that you have in your brief here
19 that looking at it, I believe it is the *Batchelor* case, that the
20 accused knew that he was dealing with an enemy. Is that the,
21 "knowing", that they have to--

22 CDC[MR. COOMBS]: What they have to show, and for the direct, it
23 would have to be that. Pretty indirect, the defense's position; they

1 are going to have to show that you use the, whatever third-party,
2 whether that be WikiLeaks, *New York Times*, *Washington Post*, whatever
3 third-party you use, that you are using that third-party for the
4 purpose of getting the information to the enemy. In my other
5 hypothetical, the FedEx, that would be charged appropriately,
6 indirectly providing intelligence to the enemy because I have used a
7 third-party to get it to the enemy, as opposed to some of the other
8 cases where the Soldier meets with the enemy in order to provide
9 information and there you have direct. So, if the government's
10 theory wasn't negligent, ma'am, then instead of a nine page response,
11 it could have been as simple as two sentences. We request that you
12 deny the defenses request. When we say, "knowingly", we are saying
13 that he used WikiLeaks for the purpose of giving intelligence to the
14 enemy. That would be then, a requisite 104 offense where a Soldier
15 can face the death penalty because you can't have a death penalty
16 offense being strict liability, it just cannot be where a Soldier----

17 MJ: Well, strict liability is not at issue here. I mean there
18 is some kind of *mens rea*, whether this negligent, all the way up.

19 CDC[MR. COOMBS]: Well, the negligent though, it can't be
20 negligent either and that is why we cite the *Olson* case and the
21 *Anderson* case. It has to be a general evil intent to provide that
22 information to the enemy. And so, you have to allege, at least for
23 the, "indirectly", you have to allege that they are using whatever it

1 is to get information to the enemy. And, that is where that would
2 make sense because if it is not then it goes to our second argument.
3 If, "indirectly", is in fact, interpreted in a way in which a Soldier
4 can commit this in a negligent type fashion then with regards to the
5 Fifth Amendment due process, we would have a problem with, what if
6 there are Soldiers who are about to deploy and they know their unit
7 doesn't have proper body armor and so what they do is, they go, let
8 us say in my hypothetical, they go directly to WikiLeaks with this
9 information with the intent that it gets public and pressure is
10 brought on to the unit to correct or remedy the situation. If
11 WikiLeaks publishes that, has the Soldier now provided intelligence
12 to the enemy and is guilty of an Article 104 offense where he may
13 face the death penalty? Or, make it a little bit more removed, let's
14 say inside of WikiLeaks he goes to *The Washington Post* and they run
15 with the story. And, you know, the government can show that the
16 enemy had a copy of *The Washington Post*. Has the Soldier then
17 indirectly provided intelligence to the enemy? Or, if he gives the
18 information to his father and his father, then being worried, posts
19 it on a blog or puts it on Facebook or goes to the press himself?
20 How far removed that chain can you go before you say, "All right, you
21 are not facing a death penalty offense anymore because you know, you
22 did not indirectly give the information to the enemy." Under the
23 government's theory though, there would be no limitation to that. As

1 long as you could show that the Soldier put information out into the
2 world and the enemy--knowing that the enemy could have access to it
3 then you would be subject to a 104 offense. Under the defense'
4 position, you could be reckless, you could be--and even with the
5 government says, "Even a wanton disregard or negligent disclosure is
6 not subject to 104." So, how is that different? What if a Soldier
7 recklessly put information out on the Internet knowing that the enemy
8 has access to the Internet? Why wouldn't that be a 104 offense?
9 Even the government though concedes that it is not. If the
10 definition in this way is used and accepted then 104 would be
11 alarming in its scope. It would not give any notice to Soldiers as
12 to what conduct, if they put information out, might subject them to
13 an unauthorized disclosure or might subject them to a death penalty
14 offense. In that regard then, the misuse of 104 is readily apparent
15 because there would be no guidelines on a prosecutor's discretion.
16 It would just be whether or not the prosecutor believed you were,
17 apparently, grossly or really grossly negligent as opposed to just
18 negligent when 104 does provide a bright line requirement of general
19 evil intent. In addition to not providing notification to a Soldier
20 as to what would be the proper conduct that he or she could do, it
21 would also be overly expansive under the First Amendment if we accept
22 that type of intent for, "knowingly", and, "indirectly". The
23 government's interpretation of, "indirectly", is accepted with

1 regards to providing details to me. That same interpretation would
2 have to be with communicating with enemy. And, communication with
3 the enemy does not require anything other than----

4 MJ: Well, that is not the offense charged.

5 CDC[MR. COOMBS]: No, but what the defense is saying is if you
6 are using, "indirectly", and you are applying a definition of,
7 "indirectly", that doesn't require you to show the general evil
8 intent to actually get it to the enemy then that same definition of
9 indirectly, ma'am, would have to be applied to the other provisions
10 within Article 104. And, one of those provisions would be,
11 "indirectly", communicating the enemy. And so, notably there, the
12 communication doesn't have to contain intelligence. It is just the
13 sheer prohibition of communicating with enemy. It could be just
14 meeting with the enemy for tea. That is not acceptable. And, that
15 would be problematic under Article 104.

16 Under the government's expansive theory of, "indirectly",
17 all they would--they wouldn't have to show the actual intent to sit
18 down with the enemy, the general evil intent, just that you
19 recklessly or negligently did that. So, if you apply that to
20 communicating with the enemy then no Soldier subject to the UCMJ
21 would ever feel comfortable ever making any statement publicly to any
22 news reporter or to anyone else for fear of at a later date that
23 statement being viewed as communicating with the enemy, such as the

1 Soldier says, "You know what, my unit has a high suicide rate, or my
2 unit has a high PTSD rate."

3 MJ: Okay, Mr. Coombs, the accused isn't charged with that so
4 it's not at issue. Let's be narrow to the focus of what we are
5 addressing here, the "knowing".

6 CDC[MR. COOMBS]: Then perhaps I am not explaining it then.
7 The, "indirectly", the problem is that the, "knowingly", and the,
8 "indirectly", that the government is using coincide with each other.
9 And, they are not alleging a actual intent to use WikiLeaks to
10 provide information to the enemy, they are just arguing a negligence
11 type standard and they are saying that the, "indirectly", here is
12 because he put information on the Internet. Almost a negligent type
13 standard of, "He should have known better". And, because the enemy
14 got access to it, therefore it is a 104 violation. If that
15 definition of, "indirectly", is accepted, then it has to apply to all
16 the other aspects of Article 104.

17 MJ: And, some other court can address that. The charge at
18 issue here is the, "knowingly giving intelligence". So, let's focus
19 on that.

20 CDC[MR. COOMBS]: Well, if you just focus on the, "knowingly
21 giving intelligence" then under their theory, the Soldier could not
22 take any comment to a member of the press if the press said, "We
23 understand that your unit has a high PTSD rate, is that true?" "It

1 does, actually", or, "We have a higher suicide rate." That statement
2 to a member press where the Soldier is responding to a question, no
3 intent to provide information to the enemy, no intent to indirectly
4 give information or intelligence to the enemy, under the government's
5 theory, if the reporter would run with the story on that and the
6 government can show that the Soldier knew or should have known that
7 the enemy would have access to that, that is an Article 104
8 violation. And we know from their motion that that is how expansive
9 they are reading this because they cite, again, 380-5 and AR 530-1 as
10 providing notice to Soldiers that if you do an unauthorized
11 disclosure you can be subject to and they are 380-5 violation and if
12 you put anything on the Internet, AR 530-1 gives you the general
13 training that the enemy uses the Internet, which again, is not a
14 newsflash to anyone. But, what 530-1 does is it tells the Soldiers
15 you shouldn't put information on the Internet because the enemy may
16 have access to it. That is a far cry from actually putting
17 information on the Internet for the purpose of providing it to the
18 enemy which the defense would argue, that is all that Article 104
19 goes to. Article 104 punishes the general evil intent of
20 communicating or providing intelligence to the enemy. And, in order
21 to state an Article 104 violation, that has to be the *mens rea* that
22 the government is alleging. By alleging, "knowingly", but really
23 meaning, "negligently", that doesn't state a 104 offense. And when

1 you think about just within our Manual for Courts-Martial, short of
2 maybe, just a few other provisions, 104 is perhaps the most serious
3 offense a Soldier can face. Certainly a Soldier wearing a uniform to
4 provide intelligence to or communicate with the enemy is an extremely
5 serious offense. The reason why it has the punishment that has is we
6 want to punish shoulder who do that and knowing that they are doing
7 that. They have the general evil intent to do that. And, the *Olson*
8 case clearly makes it so that--as well as the *Anderson* case, that you
9 have to show that when you did that it was for the general evil
10 intent to communicate or provide intelligence to the enemy, not
11 because you were negligent, not because you were grossly negligent
12 but you had the intent to get it to the enemy. Absent that, it is
13 not a 104 offense.

14 MJ: Well, let me again, and I am still--let me get your
15 position on what is the difference between a general intent to give
16 information to the enemy and a specific intent to use the newspaper
17 to give information to the enemy?

18 CDC[MR. COOMBS]: Well, with regards to how the offense was
19 drafted, they did not draft in a specific intent requirement. And,
20 the *Olson* case talks about that. And, it says even though they did
21 not draft in a specific intent requirement, it is not a strict
22 liability offense. So, we are reading into that a Soldier cannot
23 commit this negligently. A Soldier cannot commit this accidentally

1 or inadvertently. You have to show a general evil intent. And, the
2 other case that defense cites says the defense counsel are on solid
3 ground when they state that the government must be alleging that
4 there was a general evil intent to provide the information to the
5 enemy. So, just because 104 does not have the specific intent
6 requirement within it, case law has interpreted, and binding case law
7 for us, has interpreted that there is an intent requirement and that
8 is a general evil intent and a cannot be committed accidentally. It
9 cannot be committed negligently or even grossly negligently.

10 So here, if the government gets up after I am done and
11 simply says, "We are intending to prove that when he provided the
12 information to WikiLeaks, he did so for the express purpose of having
13 WikiLeaks provide that to the enemy. That was his general evil
14 intent." Then, they have stated an offense and then that is the
15 burden they will be under in order to prove. But, that is not this
16 case nor has it ever been this case and I believe the government's
17 nine page response to this motion shows that they are really trying
18 to say he should have known better, he was a 35F, Intelligence
19 Analyst, he had training, he knew that the enemy mined--you know,
20 would do mining of the Internet for its information too, like we do
21 and he should have known better. He shouldn't have put this stuff
22 out to an organization that would put it on the Internet. That,
23 again, might be 793 offense, it might be a 380-5 offense, what it is

1 not is an Article 104 offense absent some intent to actually provide
2 the information to the enemy.

3 Within our motion, and again, you have not heard witnesses,
4 but we do cite to the purported alleged chat logs that address this
5 very issue of, you know, "What is your intent? Are you intending to
6 be a spy or are you intending to sell this information for money?"
7 And, the Soldier, at least in the chat logs, says, "No, I want this
8 information to be public. I want the public to hear and see this
9 information." That is not aiding the enemy. So, if we had a
10 situation where the facts were such that the court heard testimony
11 and all the testimony was this: a Soldier wanted to get information
12 out, chose to use a website that at the time was not demonized, was
13 not considered a terrible site, but was aware that the site would
14 publish information, intelligence information, the Soldier provides
15 that information to that site with the express intent that that site
16 publishes it, never with the express intent to have the enemy have
17 access to it or have that site provide the information to the enemy.
18 Because, when you think about it if that really were the intent, why
19 not just give it directly to the enemy or why not ask the site not to
20 publish it where everyone would know that the information is out
21 there, why not just ask the site to provide it to the enemy if you
22 are using it truly as a third-party intermediary? So, if that
23 testimony came out and that was the extent of the actions that the

1 government could prove, that would be a, at most, a real negligent
2 disclosure on the part of the accused. It might even be a grossly
3 negligent disclosure but that would not be something where the court
4 would--or, should allow a panel to deliberate on whether or not that
5 is an Article 104 offense. That would be the subject a 917 motion at
6 that point to take it out of the hands of the members because there
7 would be no information to support an Article 104 offense.

8 MJ: So, what is the defense' position; assume your facts are
9 you make disclosures to a website of classified information because
10 you want the public to know and you know that the enemy accesses
11 that. You have actual knowledge that the enemy accesses that website
12 and the enemy will get that information even though your specific
13 intent is to disclose it publicly so everybody else gets the
14 information. Under those facts, what is your analysis under Article
15 104?

16 CDC[MR. COOMBS]: Yeah, you would still, and that is the *Olson*
17 and *Anderson* case again, you would still have to show that there was
18 the general evil intent to get it to the enemy because the fact
19 scenario that you gave, that would be like a grossly negligent and
20 wanton and reckless type theory. That wouldn't be an intent to
21 actually get the information to the enemy. That is what 104
22 punishes. Otherwise, then that same statement could be said for any
23 disclosure to the Internet because nowadays with Google, assuming you

1 have unrestricted Google access, you are not in a country where it is
2 restricted in some way, if it is on the Internet you can find it
3 quite easily with a search term. So, if that standard were and be
4 applied with even if you said, "You, Soldier, should have known
5 better. And you probably--you can even show you probably knew there
6 was a good likelihood that the enemy would get it." But, if that was
7 not your intent, that is not a 104 violation. So, if I take
8 information and I put it on the Internet right now, here today, I
9 probably have a pretty good idea that the enemy was going to have
10 access to that, unless somehow I restrict the access on the Internet
11 where you have to have a password to look at it. But, short of that,
12 I think there is no way anyone could say I wouldn't have an
13 understanding that the enemy can have access to that. But, that is
14 not what 104 punishes. 104 punishes the general evil intent of a
15 person to actually get information to the enemy. That is what
16 subjects you to the death penalty or, in this case, because they
17 haven't gone forward as a capital offense, with life without parole.
18 And because of that it has to be read that we want to require the
19 general evil intent of getting that information to the enemy, not
20 reckless, wanton disregard for what might happen but actual intent to
21 get it to the enemy. That is what we want to punish. The latter
22 part, ma'am, if the information is such as you pose where the Soldier
23 does have knowledge that it is pretty likely that the enemy is going

1 to get it because of the fact that he is putting it on the Internet--

2 --

3 MJ: Well, my scenario was he knows the enemy is going to get
4 it.

5 CDC[MR. COOMBS]: I would say that anyone who puts information
6 on the Internet knows. And, in the government's own motion states
7 that Soldiers receive annual training under 530-1 that tells them
8 that. You put information on the Internet, the enemy has access to
9 it. So, everyone knows that. That would be an appropriate factor,
10 ma'am, in aggravation if that were where the Soldier was found guilty
11 of the 793 or 380-5 where you would say, "You know what, not only did
12 you do an unauthorized disclosure that could cause harm to the United
13 States or aid any foreign nation, but, oh by the way now, on
14 sentencing we can show that the enemy had access to it. And, we can
15 even show that you were reckless in your disregard for the fact that
16 the enemy would have access to it. That would be proper aggravation,
17 but that does not, and that theory does not support a 104 violation
18 because if you allow it to do so then again, nowadays the Internet
19 being what it is, anyone could find anything if it is posted on the
20 Internet. Everyone knows that. At a certain age, and our Soldiers
21 now have grown up with the Internet, the world is very small and
22 obviously if we say that you post something on the Internet, now you
23 are facing an Article 104 because you should have known better. That

1 would make Article 104 unconstitutional. And, in order to avoid the
2 unconstitutional vagueness of Article 104 in that instance, you have
3 to read the requirement of the general evil intent to actually mean,
4 "Government, you have to show that either the Soldier directly
5 communicated with the enemy with the intent, the evil intent to
6 communicate with enemy, not accidentally, negligently, grossly
7 negligently, or you have to show for, "indirectly", that the Soldier
8 used whatever indirect means that you are alleging for the express
9 purpose of giving the information to the enemy. Then, yes, we would
10 want to punish that Soldier under Article 104 because the Soldier has
11 the requisite general evil intent. But, absent that, under either
12 way, the Soldier sits down with somebody, talks to somebody that
13 Soldier thinks is a reporter but later we find out it is Al Qaeda and
14 the Soldier should have known that based upon some set of facts,
15 well, that might be an unauthorized disclosure but that is not going
16 to commuting with the enemy. Or, on the side where the Soldier uses,
17 indirectly, in this case WikiLeaks, but it could have easily been *The*
18 *Washington Post*, *The New York Times*. Because, I think any Soldier
19 would know that the enemy has access to *The New York Times*. So, with
20 the Soldier went to a reporter from *The New York Times*, gave the
21 charged information here knowing, 100 percent fact, that the enemy is
22 going to have access to it because *The New York Times* is going to run
23 with the story and it is going to be worldwide news. So, unless the

1 enemy has no ability to see papers or Internet, the enemy is going to
2 get it. That is not communicating with the enemy, especially if the
3 Soldier's intent is not to communicate with the enemy. So, we have
4 to punish the general evil intent to use that, "indirectly" source,
5 to get the information to the enemy.

6 So, subject to your questions, ma'am.

7 MJ: Thank you, I think I asked them.

8 CDC[MR. COOMBS]: Thank you.

9 MJ: Captain Morrow?

10 ATC[CPT MORROW]: Yes, ma'am. The United States requests this
11 court deny the defense motion to dismiss the Specification of Charge
12 I for failure to state an offense. Additionally, the United States
13 requests the court deny the defense motion to dismiss based on claims
14 of vagueness or substantial over breadth in violation of the fifth
15 and first amendments. Taking each defense argument in turn beginning
16 with failure to state an offense; Your Honor, the specification of
17 charge one adequately states an offense. It alleges all of the
18 elements necessary for giving intelligence to the enemy under Article
19 104(2). The specification includes *mens rea*, "knowledge". It
20 includes words indicating criminality, "without proper authority".
21 It includes an act, this, "giving intelligence to the enemy".
22 Further, in this case United States has provided the defense with a
23 bill of particulars to cure any notice or double jeopardy issues. We

1 have specified the enemy--we have identified the enemy. We have
2 identified the intelligence given and we have identified the indirect
3 means utilized by the accused.

4 The defense is correct in saying that courts are generally
5 instructed that Article 104 (2) requires a finding of general
6 criminal intent. That is wholly different than what is required to
7 be alleged in the specification. In this case, the government has
8 alleged a general criminal intent by specifying that the accused
9 acted knowingly and without proper authority and is adequate to state
10 an offense.

11 The defense motion repeatedly emphasizes what the United
12 States is required to prove in this case. They clearly do not
13 believe that the United States has evidence of knowledge. Again,
14 that is not--that should not be an inquiry for void for vagueness or
15 substantial over breadth or even for failure to state an offense.
16 Those are determinations for the trier of fact.

17 MJ: Well, let me go back with you with that. What is the
18 government theory that, "knowledge", means; knowledge of what?

19 ATC[CPT MORROW]: Knowledge is awareness, ma'am. So, knowledge
20 that the accused knowingly gave intelligence through indirect means.
21 And, in this case, what the government is alleging is knowledge of a
22 very definite place. We are not talking about knowledge generally of
23 the Internet or that the enemy, you know, has a computer and uses the

1 Internet. We are talking about knowledge of a very specific place on
2 the Internet.

3 MJ: What is the government theory then with respect to this
4 offense?

5 ATC[CPT MORROW]: What do you mean by that, ma'am?

6 MJ: I understand you have a failure to state an offense
7 analysis is did you state--you know, is it missing element, do you
8 have anything there as to protect from double jeopardy. I got that.
9 With respect to, I guess I am addressing the defense's argument that
10 knowledge means--and, the *Batchelor* case and some of those other
11 cases, "knowledge" means that you are knowing that you are
12 communicating with the enemy.

13 ATC[CPT MORROW]: Sure, and I think this goes back to, I mean,
14 the defense believes there is some kind of--that Article 104 is a
15 serious offense because it requires some kind of bad faith and that
16 is just simply not the case. Article 104 is a serious offense
17 because it has serious consequences. I could have the purest motives
18 in the world but if I do something knowingly and without proper
19 authority, in terms of interacting with the enemy, that is a
20 violation of Article 104.

21 MJ: When you are talking about interacting with the enemy--so,
22 in this case, and again I think I am jumping from the failure to
23 state an offense over here to the----

1 ATC[CPT MORROW]: Void for vagueness?

2 MJ: ----Void for vagueness and overbroad is applied, but what
3 is the government--I will give the same fact pattern to you that I
4 gave to the defense. I put something out on the Internet with the
5 specific intention of exposing government malfeasance, if you will.

6 ATC[CPT MORROW]: With the specific intent of exposing
7 government malfeasance?

8 MJ: But, I know that when I put this out on the Internet the
9 enemy is going to see it. I know that.

10 ATC[CPT MORROW]: You know that because they know that they will
11 go to that specific website or they go to the specific website?

12 MJ: Yes.

13 ATC[CPT MORROW]: In that case, that would be knowledge,
14 absolutely. I think another way to look at this, and one thing about
15 void for vagueness that I think we have kind of gotten away from is
16 that it has to be related to the conduct the accused is charged with.
17 It is not a--it can't be referred to in hypotheticals. So, potential
18 over breadth can be referred to in hypothetical--or, you know, it can
19 be litigated with respect to hypotheticals. But, void for vagueness,
20 it has to be focused on the actual conduct.

21 But, one way of looking at this, ma'am, is that we are
22 getting caught up in the use of the Internet in terms of how that
23 alters the word, "giving". Use of the Internet does not alter the

1 word, "giving", at all. If I send you an e-mail and that e-mail
2 contains a file, I mean no reasonable person would argue that I gave
3 you a file, I mean, right? If I sent an e-mail to Mr. Prather and I
4 knew that Mr. Prather auto forwarded every single one of my e-mails
5 to him to you; from me, to him, to you, I would have knowledge that
6 you were getting that file as well. But, I don't necessarily have to
7 have the specific intent. I don't necessarily have to be giving
8 something to Mr. Prather for the specific purpose of giving it to
9 you, I only have to have knowledge at that time.

10 MJ: Well, what is the difference in between just uploading
11 something on the Internet and anybody who has a computer will have
12 access to it?

13 ATC[CPT MORROW]: Well, then we are talking about a question of
14 knowledge. I mean, we are not--I do not think--the government's
15 position is not that we are talking knowledge of--that something
16 might be accessible to the enemy, in fact, I am not exactly sure
17 where that comes from except that that sort of language is in the
18 specification--Specification 1 of Charge II, knowing something might
19 be accessible to the enemy. In this case, we are talking about
20 knowingly giving intelligence to the enemy through indirect means.
21 In this case we are talking about knowingly giving intelligence to
22 the enemy through indirect means. So, it is trying to get away from

1 that discussion, but again, going back to it is really knowledge of a
2 very definite place.

3 MJ: So----

4 ATC[CPT MORROW]: I mean, if you knew that the--because you had
5 some prior relationship where you knew that the enemy used--went to
6 your personal blog every day and you publicly posted a file or you
7 posted troop movements on the personal blog but you had actual
8 knowledge that the enemy used your blog, yes, that would be
9 knowledge. But, sort of generalized knowledge of, "If you use the
10 Internet", I think the government concedes that you would not get
11 there under Article 104.

12 MJ: So, it is the defense's position then that--I mean, the
13 government's position then that is if you know that the enemy will
14 access what you post, then that is enough for a violation of Article
15 104?

16 ATC[CPT MORROW]: Yes, ma'am.

17 MJ: What if you think they might?

18 ATC[CPT MORROW]: That they might? Well, that gets to sort of,
19 your instructions on what knowledge would mean; I mean, reasonably
20 should have known or actual knowledge. I think the MCM, I mean,
21 knowledge is awareness, and in this case the MCM says actual
22 knowledge is required. But again, that would be an instruction that
23 we would determine later. But, assuming the government's evidence is

1 there of knowledge of a very definite place there can be no question
2 that the government has adequately stated an offense in this case.

3 MJ: All right. Let us talk about the vague argument. What is
4 the government's position on that?

5 ATC[CPT MORROW]: Yes, Your Honor. In short, Article 104 is not
6 unconstitutionally vague because an ordinary Soldier can understand
7 what conduct is prohibited and the application of the Article in this
8 case and in this manner does not encourage arbitrary and
9 discriminatory enforcement.

10 Again, the defense argument with respect to vagueness
11 relies mainly on the use of hypotheticals and I think the Supreme
12 Court has been very clear in this case, in this instance that under
13 the void for vagueness doctrine the alleged vagueness of the statute
14 must be judged in light of the conduct charged. So, *Parker v. Levy*
15 the court stated that one that whose conduct a statute clearly
16 applies may not challenge the statute as vague. Additionally, *US vs.*
17 *National Dairy Corporation*, the court stated that pronouncing an act
18 of Congress unconstitutional is not to be exercised with reference to
19 hypotheticals. And in this case, Article 104 is plainly
20 constitutional in its application to the conduct of the accused. It
21 puts a reasonable Soldier on notice that compromising intelligence to
22 the enemy through the Internet without authority would subject him or
23 her to criminal sanction of the Article. And again, I refer back to

1 my example to you. I mean, use of the Internet, it should not and
2 does not understand alter the common understanding of the word,
3 "giving". Again, if I sent you an e-mail I don't think anyone could
4 speak to the fact that I am giving you something if I attach a file
5 or if I include some text. And again, under that same analysis, I
6 think a reasonable Soldier would understand that posting intelligence
7 to a website used by the enemy without authority, if the Soldier knew
8 that the enemy used that website that they would access that
9 information, would constitute indirectly giving intelligence to the
10 enemy. Additionally, as referenced by the defense----

11 MJ: So, under the Government theory, then, in this case, the
12 Government intends to show that there is a particular website that
13 this information was sent to, the accused was aware that that the
14 enemy used that website?

15 ATC[CPT MORROW]: Yes, ma'am.

16 MJ: Okay, proceed.

17 ATC[CPT MORROW]: Additionally, Army regulations put every
18 Soldier on notice that disclosing intelligence on the Internet
19 without proper authority may subject an individual to action of the
20 UCMJ. We have kind of talked about that *ad nauseam* with respect to
21 AR 380-5 as well as AR 530-1, which is the Operations Security
22 Regulation, which, as stated in the government motion refers
23 specifically to adversaries and their use of the Internet. Further,

1 Article 104, by its terms, does not encourage arbitrary and
2 discriminatory enforcement. It provides clear standards by which to
3 guide enforcement. So, we are not talking about a statute that uses
4 words like "contemptuous", "credible and reliable", or
5 "unreasonable", or "unjust". We are talking a statue that uses words
6 like, "knowingly", "giving intelligence", "without proper authority".

7 In addition, the government would argue that arbitrary and
8 discriminatory enforcement is less of a concern in the military than
9 in the civilian world. In our system, of course, commanders drive
10 charging decisions. Arbitrary charges would be antithetical to good
11 order and discipline and would produce a less efficient and less
12 effective fighting force.

13 MJ: Well, Article 104 applies to civilians too, does not it?

14 ATC[CPT MORROW]: Actually, you are--I think you are correct,
15 Your Honor.

16 Finally, Your Honor, if there is any question about the
17 application of the statute to the accused's conduct in this case, the
18 Supreme Court on several occasions, it says that statutes are not
19 automatically invalidated as vague simply because certain marginal
20 offenses fall within their language. You can find that language in
21 *Jordan v. DeGeorge*, *Parker v. Levy*, and *United States v. National*
22 *Dairy Products Corporation*.

23 MJ: Okay, talk to me about the over breadth.

1 ATC[CPT MORROW]: Yes, Your Honor. Again, the government's
2 position is that the application of Article 104 to the conduct in
3 this case, including use of the word, or term, "indirectly", or,
4 "through indirect means", does not criminalize a substantial amount
5 of constitutionally protected speech. One thing you raised with Mr.
6 Coombs on his argument is the fact that all of his examples were
7 relating to--well, actually one thing that was, kind of, not really
8 mentioned was the fact that all of the examples that he used were
9 either 104(1) cases, so *Olson* was a 104(1) case, so charged under the
10 first section of Article 104. In addition, the *Anderson* case as well
11 was charged under the first section of Article 104 as well. It was
12 in attempting to aid the enemy. And, in that case, just to
13 distinguish that case from this case and----

14 MJ: So, in those cases required specific intent?

15 ATC[CPT MORROW]: Yes. That is what I am getting at. So, they
16 are different offenses entirely. So, it is difficult for the
17 government to address in terms of substantial over breadth if the
18 defense has not established a least one example of an application
19 that would be unconstitutional. So, an example of an ordinary lawful
20 activity that would come within the gambit of the statute. The
21 defense referred generally to, you know, a Soldier talking about--
22 talking to a reporter about PTSD in the military or low morale among
23 the certain unit, or whatever. Again, we are not sure, you know,

1 under that example we are not sure about the individual's knowledge
2 in that case. We are not sure whether his knowledge--he knew that
3 whoever he was talking to would certainly post it in the specific
4 place for the--that the enemy--that he knew the enemy would access.
5 We do not know whether the Soldier had authority to talk to that
6 reporter. These are all questions that, you know, have to be
7 answered before we can really address substantial over breadth.

8 MJ: So, when you--Are you saying here then the, "without
9 authority", what does that mean in this statute. I am looking at--
10 let us look at some of these hypotheticals that Mr. Coombs is citing
11 in here. You have, a top--a military official discussing what could
12 be broadly described as classified intelligence with a reporter. And
13 then, the official would likely have known that the information could
14 be accessed by the enemy once the reporter publishes it.

15 ATC[CPT MORROW]: Well, I mean, he used, I think, he used a
16 senior official in that case. I mean, I would assume the senior
17 official had the authority to talk, but, if we are assuming that he
18 did not even have the authority to talk, we also got this, you know,
19 are talking about 104(2) giving intelligence to the enemy; are we
20 talking about a 104(2) communicating with the enemy? Because, a lot
21 of these examples appear to be, or could be characterized as
22 something that might be communicating with the enemy. But, one other
23 thing about intelligence----

1 MJ: Okay, now----

2 ATC[CPT MORROW]:----I am sorry, ma'am.

3 MJ: No, go ahead.

4 ATC[CPT MORROW]: One other thing that Captain Whyte mentioned
5 about intelligence is that intelligence is--I mean it is a fairly
6 broad definition, at least under Article 104. It is information
7 given to and received by the enemy that is helpful. It has to be
8 true in part and also helpful.

9 MJ: So, you just returned--just let me throw a fact pattern out
10 at you and see if this would fall under Article 104 in your view. A
11 Soldier returns from Afghanistan, talks to a reporter, nobody in his
12 unit says he can, he says--brings this PTSD, unit had very low morale
13 over in that particular part of Afghanistan.

14 ATC[CPT MORROW]: Yes, ma'am.

15 MJ: Knows that the enemy is going to probably read the New York
16 Times. It is aiding the enemy because now the enemy knows that the
17 people over in that particular part of Afghanistan have low morale.

18 ATC[CPT MORROW]: It would certainly be information helpful to
19 the enemy, but I'm not sure you get to, "knowledge", in that case.
20 What is the knowledge that, you know, that the New York Times is a
21 website? I mean, really we have to bring it back to a specific case,
22 a definite place on the Internet. We are not talking, I mean,
23 knowledge generally that the enemy goes to the New York Times every

1 day. It is kind of hard to address concerns when our case is a very
2 definite place.

3 MJ: So, the government is alleging a very definite place with
4 very definite knowledge by the accused that the enemy goes to that
5 place?

6 ATC[CPT MORROW]: That is correct, ma'am.

7 MJ: All right.

8 ATC[CPT MORROW]: Subject to your questions, ma'am, that is all
9 I have.

10 MJ: I think I just asked them, thank you.

11 ATC[CPT MORROW]: Okay.

12 MJ: Mr. Coombs?

13 CDC[MR. COOMBS]: Yes, ma'am.

14 Ma'am, under the hypothetical that you gave to the
15 government, if you provided information for the express purpose of
16 exposing government malfeasance and we can say you provided it to a
17 definite place, that you knew that the enemy definitely could go to,
18 and as a 35F, you understand that the enemy uses the Internet. So,
19 you provided to a definite place, to expose government malfeasance,
20 knowing that the enemy might go to that place or, in fact, knowing
21 that, the enemy does, but that is not your intent to provide the
22 information to the enemy. Under the government's theory of Article
23 104, if you know that the enemy is going to get it, you have a 104

1 violation. If you think the enemy might get it, well, perhaps you
2 don't because you get into the negligence standard, or some other
3 grossly reckless standard. The problem with that is Article 104 is
4 not unconstitutional. The provisions within Article 104 and the case
5 law that interprets 104 clearly makes it constitutional. Our
6 argument is not that Article 104 is unconstitutional; our argument is
7 how the government is applying Article 104 would result in it being
8 unconstitutional. And, therefore, in order to avoid an
9 unconstitutional reading of the statute you have to apply the case
10 law as what the requirement would be. The government has--go ahead,
11 ma'am.

12 MJ: Go ahead.

13 CDC[MR. COOMBS]: Go ahead, ma'am.

14 MJ: I am looking again at *Olson* and the cases, I mean, if they
15 are attempt cases, they are specific intent cases. So----

16 CDC[MR. COOMBS]: Well, for the aiding the enemy, you have got
17 to show the specific intent, but for the general intent crimes, you
18 have to show the general intent to provide the information to the
19 enemy, the general evil intent. And, the *Olson* case, even though it
20 is a specific intent crime, *Olson* and the other cases cited clearly
21 indicate that defense counsel are on solid ground that you cannot
22 commit this crime negligently. And, even the government concedes
23 that you cannot commit negligently or even grossly negligently. You

1 have to have had a general evil intent to communicate with the enemy.
2 So, under your hypothetical, if you go, and we know that the factual
3 play out that you go to a definite website, that you definitely know
4 the enemy has access to and goes to, but you go there to expose
5 government malfeasance, not the communicate with the enemy or provide
6 intelligence to the enemy, you have not committed a 104 violation.
7 What you may have done is committed and unauthorized disclosure
8 depending upon the information and therefore, that access by the
9 enemy may be an aggravation aspect to the case but it is not a 104
10 offense. And, the defense would submit that when you see now even
11 with their oral argument, they are not saying to Your Honor that, "We
12 are alleging that he provided this information to WikiLeaks for the
13 express purpose of WikiLeaks providing it to the enemy. We are
14 alleging that he provided the information to WikiLeaks knowing that
15 there is a very good chance that the enemy is going to get it. And,
16 because he knew that the enemy was going to get it, and in fact,
17 maybe he had a"---they would have to imply there that he absolutely
18 knew the enemy was going to get it. That is a grossly negligent
19 standard, if anything else, if the intent was not to provide
20 information to the enemy. We punish people based upon their intent--
21 --

22 MJ: Isn't that a roundabout way of getting to specific intent?

1 CDC[MR. COOMBS]: Not really, because you still have to show the
2 general evil intent to communicate or provide intelligence to the
3 enemy. We punish people based, if that all, based upon their intent.
4 There are certain offenses that are premised on the negligent
5 standard and then we punish them because they should have known
6 better. Article 104 is not one of those offenses. Article 104 is an
7 offense that we punish people based upon their intent. You have an
8 intent to give intelligence to the enemy, that is what we are
9 punishing. And, it is the general evil intent to do so. Just
10 because the statute does not have a specific intent read into it, we
11 read into that the, "knowingly", here. And when Your Honor asked the
12 government, "Well, what is the 'knowing' aspect?" The "knowingly"
13 communicating or providing intelligence in this case, "knowingly
14 providing intelligence to the enemy"; that is what, "knowingly",
15 attaches to. You knowingly provide intelligence to the enemy. So,
16 that has to be what they are alleging, the intent. Not that you
17 recklessly provided intelligence to the enemy, not that you should
18 have known better based upon your knowledge and training. Because,
19 if their standard is correct it does not matter if it is a definite
20 site or not. I think anyone today knows if you put information on
21 the Internet, the enemy is going to have access to it. That, without
22 shadow of a doubt, anyone would know. So, if the government's theory
23 is correct now, because of AR 380-5 and AR 530-1, the training we

1 provide Soldiers, anytime you put any information on the Internet
2 that is intelligence we are going to hit you for an unauthorized
3 disclosure, and that maybe 380-5 or 793(e), but because anyone now
4 with--who does anything with computers knows if you put it on the
5 Internet, it is for the world to see. And, if you put intelligence
6 on the Internet, you know that if someone said to--put the person on
7 the stand, said--"When you put it on the Internet, did you know that
8 the enemy would have access to it?" Well, the answer has to be,
9 "Yes. I mean, I put it on the Internet, I know that anyone would
10 have access to it. So, the enemy as a subset of anyone, the answer
11 has to be yes." That cannot then mean a 104 offense goes to the
12 members. Without some information to show that the follow-up
13 question could be, "When you provided to 'X' site, you did so with
14 the express intent that they get to the enemy or you did so with the
15 intent to--for the purpose of having that site get it to the enemy
16 because for whatever reason, you couldn't on your own." That is a
17 104 violation.

18 MJ: I guess where I am having, and again, I think my own
19 hypotheticals are giving me a little bit of trouble here, but I am
20 now going back looking at the *Huet-Vaughn* line of cases. The
21 hypothetical that I give you before about having a specific intent to
22 expose government malfeasance, I guess that would have been better
23 phrased if you specifically intend to disclose something on the

1 Internet with the knowledge that if you do that the enemy is going to
2 get it, you know that, with the motive of exploring government
3 malfeasance, what is the defense's position on whether that falls
4 within Article 104?

5 CDC[MR. COOMBS]: Yeah, that, I think--and, a lot of these
6 hypotheticals then start to confuse motive with intent, and they are
7 different. You know, motive is why you do something; intent is, you
8 know--motive might be your purpose, where the intent is----

9 MJ: Yeah, I intend to put it on the Internet.

10 CDC[MR. COOMBS]: Exactly. And so, they are different. That is
11 why motive, at least for the 104 offense wouldn't be relevant at--in
12 the merits portion. It is what's your intent, what was your intent
13 at the time, not, you know, "I am going to put this out"--like, there
14 are some cases where, one case in particular, where the accused
15 motive was to go talk to the enemy because he believed if he could
16 talk to the enemy he could convince the enemy that fighting a war was
17 not a good idea. Great motive, but that does not mean anything. You
18 have committed an Article 104 violation. The intent though, aspect
19 of it that is implicit in there is that the Soldier went there
20 knowing that he was talking to the enemy. So, using that same
21 hypothetical of motive/intent, if you talk to somebody about, "Hey,
22 war is not a good idea", and you are talking to them not knowing who
23 they are then you cannot be punished for a 104 violation if later we

1 find out that is the enemy. So, the idea of the hypothetical of you
2 provide something on the Internet and your motive is to expose
3 malfeasance and your intent is to expose malfeasance but you do so
4 knowing that the enemy is going to have access to it, I think that
5 hypothetical applies to anything ever put on the Internet regardless
6 of site. So, there is no Soldier who he or she, if they were on the
7 stand, under oath, could say with a straight face, "I did not know
8 that the enemy could have access to something I put on the Internet."
9 Everyone knows that. And we know that just from the parable
10 hypotheticals of once you put something on Facebook or any other
11 social website it is there for all eternity. So, people know that
12 when you put something on the Internet, you can--everyone has access
13 to it. It is an open book, unless somehow you restrict that access.
14 So, you have got to have more than just putting it on the Internet
15 because I think any Soldier would have to admit, "I knew when I put
16 it on the Internet for the purpose of exposing malfeasance, that is
17 my express purpose, and never one to communicate with the enemy. I
18 never had a desire to." They would have to admit though that they
19 knew the enemy could get it. And certainly, 35F, intelligence
20 analysts, would have to admit that. Although, I don't think that
21 takes that MOS to know that. I mean, even the government says
22 themselves that annual training under 530-1 puts all Soldiers on
23 notice, you put it on the Internet, the enemy is going to have access

1 to it. So, if we go with their version of, "knowing", in this
2 instance then you cannot put anything on the Internet period. It
3 does not matter whether it goes to WikiLeaks, the New York Times,
4 your own blog, it does not matter. Every Soldier is on notice that
5 the enemy has access to something you put on the Internet. And, that
6 is where, if you read that, that is where you run into the problems
7 of being in violation of the Fifth Amendment and the First Amendment.
8 You avoid this by saying, "No, no, no, you have to say when the
9 Soldier put it there; they had the general evil intent of getting it
10 to the enemy. Not just that they knew or they should have known or
11 that they actually knew the enemy would get it." It has to be for
12 that added little purpose of the general evil intent that the enemy
13 gets its. And then, that is a 104 violation.

14 MJ: Let me just ask you one more question. Neither side
15 mentioned the *United States v. Wilcox* and the First Amendment
16 analysis which is the most recent court--granted, it is for the
17 Article 134 offense, does either side had any input on their position
18 with respect that case?

19 CDC[MR. COOMBS]: I would have to get back to you on that, I am
20 drawing a blank on that case.

21 ATC[CPT MORROW]: The same with the government, Your Honor.

22 MJ: All right. The site would be 66 MJ 442. I am not going to
23 rule on this until tomorrow so if either side wants to address the

1 Court with anything with respect to *Wilcox*, I am happy to hear it.

2 If you don't, that is fine.

3 ATC[CPT MORROW]: Ma'am, did you say 432?

4 MJ: I said, "66 MJ 442, 2008."

5 ATC[CPT MORROW]: Thank you.

6 MJ: And again, it is an Article 134 context so--All right,
7 anything else with respect to this motion?

8 CDC[MR. COOMBS]: Nothing from the defense, Your Honor.

9 ATC[CPT MORROW]: No, Your Honor.

10 MJ: All right, and anything else we need to address before we
11 recess the court today?

12 CDC[MR. COOMBS]: No, ma'am.

13 TC[MAJ FEIN]: No, ma'am.

14 MJ: Okay, court's in recess.

15 [The Article 39(a) session recessed at 1459, 25 April 2012.]

16 [END OF PAGE]

1 [The Article 39(a) session was called to order at 1007, 26 April
2 2012.]

3 MJ: This Article 39(a) session is called to order.

4 Let the record reflect all parties present when the court
5 last recessed are again present in court.

6 All right, the Court is prepared to rule on the defense
7 motion to dismiss for unreasonable multiplication of charges.

8 The defense moves to dismiss certain charges and
9 specifications based on unreasonable multiplication of charges,
10 "UMC". The government opposes.

11 After considering the pleadings, the classified enclosure
12 presented by the defense and argument of counsel, the Court finds and
13 concludes as follows.

14 Findings of fact.

15 The government stipulates to the facts set forth in the
16 defense motion with a singular exception, the Court adopts the
17 following relevant facts:

18 1) PFC Manning is charged with five specifications of
19 violating a lawful general regulation; one specification of aiding
20 the enemy; one specification of conduct prejudicial to good order and
21 discipline and service discrediting; eight specifications of
22 communicating classified information; five specifications of stealing
23 or knowingly converting government property; and, two specifications

1 of knowingly exceeding authorized access to a government computer in
2 violation of Article 92, 104 and 134, Uniform Code of Military
3 Justice, 10 United States Code Sections 892, 904 and 934, 2010. This
4 case has been referred to trial by general court-martial by the
5 Convening Authority.

6 The defense argues that the following four categories of
7 specifications are an unreasonable multiplication of charges against
8 PFC Manning. The specifications are, in relevant part:

9 Category one, Article 134, 18 United States Code Section
10 641 and Article 134 18 United States Code Section 793(e).

11 a) Charge II, Specifications 4 and 5 involving the Combined
12 Information Data Network Exchange Iraq database containing more than
13 380,000 records belonging to the United States Government.

14 Specification 4 of Charge II, Article 134 18 U.S.C. 641,
15 PFC Manning did at, or near, Contingency Operating Station Hammer,
16 Iraq, between on or about 31 December 2009 and on or about 5 January
17 2010, steal, purloin, or knowingly convert the Combined Information
18 Data Network Exchange Iraq database containing more than 380,000
19 records belonging to the United States Government in violation of 18
20 United States Code Section 641 and Article 134.

21 Specification 5 of Charge II, Article 134, 18 United States
22 Code Section 793(e), PFC Manning, having unauthorized possession of
23 classified Combined Information Exchange Data Network Exchange Iraq

1 database records, did, at the same place specified in Specification
2 4, between on or about 31 December 2009 and, or about 9 February
3 2010, willfully communicate, deliver, transmit or cause to be
4 communicated, delivered, or transmitted, these records to a person
5 not entitled to receive them, with reason to believe that the records
6 would be used to the injury of the United States or to the advantage
7 of any foreign nation in violation of 18 United States Code Section
8 793(e) and Article 134.

9 b) Charge II, Specifications 6 and 7, involving Combined
10 Information Data Network Exchange Afghanistan database containing
11 more than 90,000 records belonging to the United States Government.

12 Specification 6 of Charge II, Article 134, 18 United States
13 Code Section 641, PFC Manning did at, or near contingency Operating
14 Station Hammer, Iraq between on or about 31 December 2009 and on or
15 about 8 January 2010, steal, purloin or knowingly convert the
16 Combined Information Data Network Exchange Afghanistan database
17 containing more than 90,000 records belonging to the United States
18 Government in violation of Section 641 and Article 134.

19 Specification 7 of Charge II, Article 134, 18 United States
20 Code Section 793(e), PFC Manning did, having unauthorized possession
21 of classified records contained in the Combined Information Data
22 Network Exchange Afghanistan database did, at the same place
23 specified in Specification 6, between on or about 31 December 2009

1 and on or about 9 February 2010, willfully communicate, deliver,
2 transmit, or cause to be communicated, delivered or transmitted these
3 records to a person not entitled to receive them with reason to
4 believe the records could be used to the injury of the United States
5 or to the advantage of any foreign nation in violation of section
6 793(e) and Article 134.

7 c) Charge II, Specifications 8 and 9 involving the United
8 States Southern Command database containing more than 700 records
9 belonging to the United States Government.

10 Specification 8 of Charge II, Article 134, 18 United States
11 Code Section 641, PFC Manning did at or near Contingency Operating
12 Station Hammer, Iraq, on or about 8 March 2010, steal, purloin, or
13 knowingly convert a United States Southern Command database
14 containing more than 700 records belonging to the United States
15 Government in violation of Article 641 and Article 134.

16 Specification 9 of Charge II, Article 134, 18 United States
17 Code 793(e), PFC Manning, having unauthorized possession of
18 classified records contained in the database specified in
19 Specification 8, did at the same place specified in Specification 8,
20 between on or about 8 March 2010 and on or about 27 May 2010
21 willfully communicate, deliver, transmit or cause to be communicated,
22 delivered, or transmitted those records to a person not entitled to
23 receive them with reason to believe that the records could be used to

1 the injury of the United States or to the advantage of any foreign
2 nation in violation of section 793(e) and Article 134.

3 Category two, Article 134, 18 United States Code Section
4 641 and 18 United States Code Section 1030(a)(1).

5 (a) Charge II, Specifications 12 and 13 involving the
6 Department of State Net-Centric Diplomacy Database containing more
7 than 250,000 records belonging to the United States Government.

8 Specification 12 of Charge II, Article 134, 18 United
9 States Code Section 641, in that PFC Manning did, at or near
10 Contingency Operating Station Hammer, Iraq, between on or about 28
11 March 2010, and on or about 4 May 2010, steal, purloin, or knowingly
12 convert the Department of State Net-Centric Diplomacy Database
13 containing more than 250,000 records belonging to the United States
14 Government in violation of section 641 and Article 134.

15 Specification 13 of Charge II, article 34, 18 United States
16 Code Section 1030(a)(1), PFC Manning at the time--at the same place
17 specified in Specification 12 between on or about 28 March 2010 and
18 on or about 27 May 2010 knowingly exceeded his unauthorized access on
19 the Secret Internet Protocol Router computer, obtained classified
20 Department of State cables determined to require protection against
21 unauthorized disclosure and willfully communicated, delivered,
22 transmitted, or cause to be communicated, delivered or transmitted
23 these cables to a person not entitled to receive them with reason to

1 believe these cables so obtained could be used to the injury of the
2 United States in violation of 18 United States Code Section
3 1030(a)(1) and Article 134.

4 Category three, charges occurring in a single transaction
5 on the same day. Charge II Specifications 4, 5, 6, and 7, that is
6 "a." and "b.", Charge II Specifications 10 and 11 which are 18 United
7 States Code Section 793(e).

8 Excuse me, I believe earlier I said there were four
9 categories of specifications, there are actually only three.

10 Specification 10 of Charge II, Article 134, 18 United
11 States Code Section 793(e), PFC Manning having unauthorized
12 possession of classified records relating to a military operation in
13 the Farah Province, Afghanistan, occurring on or about 4 May 2009,
14 did at or near Contingency Operating Station Hammer, Iraq, between on
15 or about 11 April 2010 and on or about 27 May 2010, willfully
16 communicate, deliver, transmit or cause to be communicated, delivered
17 or transmitted, these records to a person not entitled to receive
18 them with reason to believe that the records could be used to the
19 injury of the United States or the advantage of any foreign nation in
20 violation of section 793(e) and Article 134. That would be 18 United
21 States Code Section 793(e).

22 Specification 11 of Charge II, Article 134, 18 United
23 States Code Section 793(e), PFC Manning having unauthorized

1 possession of a file containing a video related to the national
2 defense did, "At or near Contingency Operating Station Hammer, Iraq,
3 between on or about 1 November 2009 and on or about 8 January 2010
4 willfully communicate, deliver, transmit or cause to be communicated,
5 delivered, or transmitted this file to a person not entitled to
6 receive it with reason to believe that the file could be used to the
7 injury of the United States or to the advantage of any foreign nation
8 in violation of section 793(e) and Article 134.

9 The law.

10 1) Rule for Court-Martial 307(c)(4) states that what is
11 substantially one transaction should not be the basis for an
12 reasonable multiplication of charges against a person. Footnote,
13 however, the Rules for Court-Martial are not so inflexible as to fail
14 to recognize that situations may arise when sufficient doubt as the
15 facts or the law exists to warrant making one transaction the basis
16 for two or more offenses. See the discussion to Rule for Court-
17 Martial 307(c)(4). The central tenet of the doctrine is to promote
18 fairness, consideration, separate from an analysis of the statutes,
19 their elements and the intent of Congress, *United States v. Quiroz* 55
20 MJ 334 at 337 Court of Appeals for the Armed Forces 2001. Discussing
21 *United States v. Teters* 37 MJ 370 Court of Military Appeals 1993.

22 2) The Court of Appeals for the Armed Forces in *United*
23 *States v. Campbell* 71 MJ 19 Court of Appeals for the Armed Forces

1 2012 endorsed the following nonexclusive factors commonly known as
2 *Quiroz* factors as a guide for military judges to consider when the
3 defense objects that the government has unreasonably multiplied
4 charges: one, whether each charge and specification is aimed at
5 distinctly separate criminal acts; two, whether the number of charges
6 and specifications misrepresent or exaggerate the accused's
7 criminality; three, whether the number of charges and specifications
8 unfairly increased the accused's punitive exposure; and, four,
9 whether there is any evidence of prosecutorial overreaching or abuse
10 in the drafting of charges. None of the factors are prerequisites,
11 one or more factors may be sufficient to establish an unreasonable
12 multiplication of charges based on prosecutorial overreaching. A
13 single act may implicate multiple and significant criminal law
14 interests, none necessarily dependent upon the other. Unreasonable
15 multiplication of charges may apply differently to findings than to
16 sentencing. A charging scheme may not implicate the *Quiroz* factors
17 in the same way that sentencing exposure does. In such a case, the
18 nature of the harm requires a remedy that focuses more appropriately
19 on punishment than findings, *Campbell* 71 MJ 23 at 24.

20 3) The Court must therefore scrutinize the prosecutor's
21 charging determinations as the prohibition against unreasonable
22 multiplication of charges addresses those features of military law
23 that increase the potential for overreaching in the exercise of

1 prosecutorial discretion. The application of the *Quiroz* factors at
2 bottom involves a reasonableness determination much like sentence
3 appropriateness, *United States v. Anderson* 68 MJ 378 at 386 Court of
4 Appeals for the Armed Forces 2010.

5 4) Where a trial court finds an unreasonable multiplication
6 of charges, dismissal of the multiplied charges is an available
7 remedy, *United States v. Roderick* 62 MJ 425 at 433 Court of Appeals
8 for the Armed Forces 2006. Consolidation of the unreasonably
9 multiplied charges is also a remedy available to the trial court,
10 *United States v. Gilchrist* 61 MJ 785 at 789 Army Court of Criminal
11 Appeals 2005.

12 Analysis.

13 Category one, the 18 United States Code Section 641 and 18
14 United States Code Section 793(e) specifications which would be
15 Specifications 4, 5, 6, and 7, and 8, and 9, of charge II.

16 1) 18 United States Code Section 641 and 18 United States
17 Code Section 793(e) specifications address distinctly separate
18 criminal acts. The 18 United States Code Section 641 offenses are
19 aimed at the theft of government property, in the present case,
20 records contained in government owned databases, while the gravamen
21 of the 18 United States Code Section 793(e) offenses is the
22 transmittal of national defense information to unauthorized persons.
23 The distinct nature of the paired specifications is illustrated by

1 comparing the elements of the offenses, see *United States v. Pauling*
2 60 MJ 91 at 95 Court of Appeals for the Armed Forces, referring to
3 the court's multiplicity analysis in deciding whether the
4 specifications at issue were aimed at distinctly separate criminal
5 acts, charging the forgery of 16 checks and four endorsements in two
6 specifications were aimed at fair--aimed at as a fair and reasonable
7 exercise of prosecutorial discretion. In order to prove that the
8 accused violated 18 United States Code Section 641, Specifications 4,
9 6, and 8, the United States must establish that the accused stole,
10 purloined, or knowingly converted United States Government property.
11 In order to prove that the accused violated 18 United States Code
12 Section 793(e), Specifications 5, 7, and 9, the United States must
13 establish that the accused communicated, delivered, or transmitted
14 national defense information to a person not authorized to receive
15 it. The defense argument that each violation of 18 United States
16 Code Section 641 was simply the first step in a violation of 18
17 United States Code Section 793(e) has been discounted by the
18 appellate courts--by military appellate courts in the context of
19 larceny and false claims convictions in the *United States v. Chatman*
20 2003 Westlaw 25945959 Army Court of Criminal Appeals June 13, 2003
21 unpublished, noting that the specific intent to deprive the United
22 States and its military property is a *mens rea* unnecessary for
23 Article 132 offenses. See also, *Campbell* recognizing that a singular

1 act may implicate multiple and significant criminal interest that are
2 not dependent on each other. Each specification alleging a violation
3 of 18 United States Code Section 641 is directed at misconduct wholly
4 independent of its paired specification alleging a violation of 18
5 United States Code Section 793(e). As in *Campbell*, in this case the
6 crime of theft of government records can be complete whether or not
7 the accused willfully communicated or transmitted the records to
8 persons not authorized to receive them.

9 2) The number of charges and specifications do not
10 misrepresent or exaggerate the accused's criminality. A facial
11 analysis of the charge sheet shows that Specifications 4, 6, 9, and
12 12 of Charge II allege a theft of government property from four
13 different databases; the Combined Information Data Network Exchange
14 database Iraq, the Combined Information Data Network Exchange
15 Afghanistan database, the United States Southern command database,
16 and the Department of State Net-Centric Diplomacy Database.
17 Moreover, the volume of records alleged to have been stolen avers in
18 the favor of the government; more than 380,000 records, more than
19 90,000 records, more than 700 records, and more than 250,000 records.

20 3) The number of charges and specifications do not unfairly
21 increase the accused's punitive exposure as an unreasonable
22 multiplication of charges for findings. Charging the accused with
23 knowingly giving intelligence to the enemy, delivering national

1 defense information to those unauthorized to receive it, theft of
2 government property, conduct prejudicial to good order and discipline
3 based upon the accused posting of classified information to a
4 publicly accessible website totaling hundreds of thousands of records
5 over the span of several months is not an unreasonable multiplication
6 of charges. The Article 104 offense has a maximum punishment of life
7 confinement without the eligibility for parole. The government could
8 have broken up a single specification into multiple specifications
9 based on specific Internet postings, see *Campbell* 71 at 25. The
10 maximum possible punishment for a conviction under either 18 United
11 States Code Section 641 or 18 United States Code Section 793 is 10
12 years incarceration for each specification, therefore, dismissal of
13 Specifications 4, 6, and 8 would reduce the accused's punitive
14 exposure by 30 years. In this case, considering the alleged volume
15 of government information and classified records involved, the
16 accused's punitive exposure has not been unfairly increased for
17 purposes of UMC for findings, see *United States v. Anderson* 68 MJ 378
18 at 386 Court of Appeals for the Armed Forces 2010.

19 4) There is no evidence of prosecutorial overreaching or
20 abuse in the drafting of the charges. The defense points to the
21 charge sheet to support its contention that the government is piling
22 on the charges against PFC Manning in order to increase the
23 likelihood of a severe sentence if he is convicted, defense motion at

1 seven. As the Court has already found, the charges are distinctive
2 in nature and proof and involve voluminous government records. The
3 defense argues that the government has pushed 18 United States Code
4 Section 641 to the edge of its permissible application as it relates
5 to national defense information relying on the separate view
6 expressed by Judge Winter in the *United States v. Truong Dinh Hung*
7 629 F.2d 908 4th Circuit 1991--excuse me, 1980. This argument has
8 been rejected by the second, fourth, and sixth circuits, *United*
9 *States v. Girard* 601 F.2d 69 at 70 and 71 2nd Circuit 1979; *United*
10 *States v. Fowler* 932 F.2d 306, 4th circuit 1991; and *United States v.*
11 *Jeter* 775 at F.2d 690 at 680 to 82, 6th Circuit in 1985. Even if the
12 government mischarged the accused with violations of 18 United States
13 Code Section 641, no relief would be warranted under the theory that
14 the government engaged in unreasonable multiplication of charges.

15 5) The government has conceded that the transmissions in
16 Specifications 5 and 7 were one transmission although of voluminous
17 records. The court will leave those specifications as separate
18 charges until after findings are announced. The defense may make a
19 motion to merge those specifications for findings at that time.

20 Category two, 18 United States Code Section 641 and 18
21 United States Code Section 1030(a)(1), Specifications 12 and 13 of
22 Charge II.

1 1) The 18 United States Code Section 641 and 18 United
2 States Code Section 1030(a)(1) specifications encompass simply
3 separate criminal acts. The 18 United States Code Section 641
4 offense is aimed at theft of government property, in the present
5 case, records contained in government-owned databases while 18 United
6 States Code Section 1030(a)(1) offense requires the transmittal of
7 classified information to unauthorized persons. The same rationale
8 of paragraph 1 in category one applies to these offenses also. The
9 specification alleging a violation of 18 United States Code Section
10 641 is directed at misconduct wholly independent of its paired
11 specification alleging a violation of 18 United States Code Section
12 1030(a)(1).

13 2) The number of charges and specifications do not
14 misrepresent or exaggerate the accused's criminality. The singular
15 act may implicate multiple and significant criminal law interests,
16 none necessarily dependent on the other. In this case, the crime of
17 theft of government records can be complete whether or not the
18 accused willfully communicated or transmitted the records to persons
19 not authorized to receive them. The decision by the government to
20 charge the accused with theft of government property and exceeding
21 unauthorized access on a computer and transmitting classified
22 information is a reasonable exercise in prosecutorial discretion.

3) The Court finds that the number of charges and specifications do not unfairly increase the accused's punitive exposure for purposes of unreasonable multiplication of charges for findings. Charging the accused with knowingly giving intelligence to the enemy, delivering national defense information to those on unauthorized to receive it, theft of government property and conduct prejudicial to good order and discipline based on the accused's posting of classified information to a publicly accessible website totaling hundreds of thousands of records over the span of several months is not an unreasonable multiplication of charges. The Article 104 offense has a maximum punishment of life confinement without the eligibility for parole. The government could have broken up the single specification into multiple specifications based on specific Internet postings. Dismissal of Specification 12 would have reduced the accused's punitive exposure by 10 years. Based on all of the above, the accused's punitive exposure has not been unfairly increased for purposes of unreasonable publication of charges for findings, *United States v. Anderson* 68 MJ 378 at 386 Court of Appeals for the Armed Forces 2010.

Category three, specifications directed at conduct that occurred on a single day. Specifications 4, 5, 6, and 7 of Charge II and Specifications 8 and 9 of Charge II.

1 1) The defense concedes there is a factual dispute whether
2 the conduct in Specifications 10 and 11 of Charge II occurred on the
3 same day or not. The parties dispute whether the conduct at issue in
4 Specifications 4, 5, 6, and 7 of Charge II occurred on the same or
5 separate dates. Whether the enumerated specifications are directed
6 at conduct that occurred on one day or different days is a factual
7 matter that should be determined by the finder of fact after the
8 close of the evidence. The defense may re-raise this unreasonable
9 multiplication of charges motion after findings have been announced.

10 Ruling.

11 The defense motion to dismiss based on unreasonable
12 multiplication of charges for findings is denied. The defense may
13 re-raise the multiplication [sic] to dismiss for unreasonable
14 multiple charges--multiplication of charges for findings and/or
15 sentence after announcement of the findings.

16 And, the ruling I just read will be Appellate Exhibit 78.

17 Does either side have anything further with this issue?

18 CDC[MR. COOMBS]: No, Your Honor.

19 ATC[CPT MORROW]: No, Your Honor.

20 MJ: All right, yesterday the Court was litigating the
21 preemption Article 92 motion that was filed by the defense with
22 respect to Specification 1 of Charge II, the Article 134 offense and
23 I had asked the parties a couple of questions to which they responded

1 via e-mail over the evening on one of them. The first question I
2 asked was with respect to First Amendment and over breadth, if the
3 parties had read *United States v. Wilcox* and had any input with
4 respect to that with respect to the vagueness, over breadth, and
5 First Amendment issues. Does either side?

6 CDC[MR. COOMBS]: Your Honor, the defense did read *United States*
7 *v. Wilcox*. We do not believe that it would apply to the 134 offense
8 so we would not be advancing that theory.

9 MJ: Okay.

10 Actually, excuse me on that, that was a 104 argument if I
11 am actually----

12 CDC[MR. COOMBS]: Well, the court said, in reference to the 134
13 offense, with regards to the 104 offense, the holding in *Wilcox*
14 indicates that unless--you cannot inhibit a Soldier's free-speech
15 rights unless it has some direct probable impact on the service in
16 some way. That is not the theory that the defense was advancing for
17 why the 104 offense was unconstitutional.

18 MJ: Okay. Government, anything?

19 ATC[CPT MORROW]: Nothing to add, Your Honor.

20 MJ: All right. The other question I had asked the parties was,
21 there appeared to be some confusion on the government's--or at least,
22 I was confused as to what the government's position was on whether
23 paragraph 1-21 of AR 380-5 is punitive. And, I asked the government

1 to come back to me with their view of that and I received e-mails
2 from both sides. Have they been marked as appellate exhibits?

3 TC[MAJ FEIN]: No, Your Honor the e-mails have not.

4 CDC[MR. COOMBS]: No, Your Honor.

5 MJ: Okay. Why don't you just go ahead then, government, state
6 for the record what it is that you believe is punitive in AR 380-5?

7 ATC[CPT WHYTE]: Yes, Your Honor, the United States Agrees that
8 Army Regulation 380-5 is a punitive regulation, however, not every
9 single provision within the regulation is punitive. The paragraph we
10 are talking about is 1-21 which is under Chapter 1 of the regulation
11 titled, "General Provisions and Program Management". Other
12 provisions within that chapter do include: abbreviations and terms,
13 responsibilities of high-level officials, and the scope of the
14 regulation along with other background information. 1-21 is intended
15 to provide notice that misconduct defined under 1-21 is subject to
16 sanction under paragraph b.--Or subsection "b." of that paragraph,
17 those sanctions are outlined and they are not limited just to those
18 sanctions which do include UCMJ actions, federal law violation.

19 MJ: So, it is the government's position that if somebody
20 willfully discloses classified information as provided in Army
21 regulation 380-5 paragraph 1-21, that that is not punishable under
22 Article 92?

1 ATC[CPT WHYTE]: It may be punishable under other provisions
2 within 380-5 but not under 1-21, Your Honor.

3 MJ: So, I am giving you an example, for willful disclosure of
4 classified information, what other provision under Article[sic] 380-5
5 can it be prosecuted under?

6 ATC[CPT WHYTE]: Well, Your Honor, in section 10-10, for
7 instance, 10-10 actually for the negligent compromise of classified
8 information, it is a punitive Article, 10-10 is. So, that justifies
9 why 1-21 is just a notice provision because other provisions within
10 the regulation do criminalize such misconduct.

11 MJ: What is the difference between 10-10 and 1-21? 10-10 says,
12 "DoD military and civilian personnel are subject to administrative
13 sanctions if they negligently disclose to unauthorized persons,
14 information, or property classified under EO 12958 or any prior or
15 subsequent order. Administrative action against US military
16 personnel under the Uniform Code of Military Justice can be pursued
17 but is not required." What is the difference between that and 1-21?

18 ATC[CPT WHYTE]: Well, Your Honor, 1-21 punishes, among other--
19 well, does not punish, sorry. Notifies persons that they could be
20 punished for negligently disclosing classified or sensitive
21 information to unauthorized persons. 10-10 explains the negligent
22 disclosure of classified information. So, there is no distinction in

1 that regard between the two paragraphs, and for that reason, the 1-21
2 is a notice provision. It is not a punitive provisions.

3 MJ: And paragraph 10-10 is?

4 ATC[CPT WHYTE]: Yes, ma'am.

5 MJ: So, where is the punitive provision for willful disclosure;
6 there is none?

7 ATC[CPT WHYTE]: The regulation, under section--it is actually
8 10-11 through 10-12 outline federal statutes that a Soldier, for
9 instance, could be punished under. And, those federal statutes, 793
10 for instance, could be used, Your Honor.

11 MJ: All right. Thank you.

12 Defense, you also sent me an e-mail on your views, would
13 you like to articulate them for the court?

14 CDC[MR. COOMBS]: Yes, Your Honor. I apologize for not having
15 the e-mail marked but defense's position is just that when you take a
16 look at that actual section, and I will have a key section provision
17 that I will ask the court reporter to mark. Just the key sections
18 from 380-5, but that section 1-21 actually falls "Under Corrective
19 Actions and Sanctions". That is what the title is for that section.
20 And, key to 1-21 when you read through where DA personnel will be
21 subject to sanctions if they "knowingly, willfully, or negligently",
22 and then it gives, 1, 2, and 3. When you look at 3, that actually is
23 informative on the fact that this is a punitive sanction because it

1 says, "violate any other provision of this regulation". So, if one
2 and two--if this section was just a notice section then you would
3 have no need to put, "violate any other provision of this
4 regulation". "Any other", makes it seem as if this is a punitive
5 section of it and you could be in trouble for violating any other
6 section as well. Additionally, there is no clear evidence--than the
7 fact that, "punitive", and the word "sanctions", and the word
8 "violation", is used several times within this particular section.
9 1-21 is the Army's version of an unauthorized disclosure that does
10 not rise to the level of what would be considered espionage under
11 793(e). When the government points you to section 10-10, all that
12 is, is regulation saying there are federal provisions that govern as
13 well and potentially that you should look to. Key in that is 10-10
14 does not have all the federal provisions. It just has a few
15 reference ones as possible provisions that a Soldier could, in fact,
16 be found guilty of, or charge of--with, if they violate the
17 regulation. So, in this instance, this is clear that we have a
18 regulation that governs this conduct and that regulation is 380-5.
19 If you violate it, the punitive sanction is 1-21 and, the government
20 could charge it as a 92. If they choose to under clause 3 they can
21 incorporate federal law and charge federal provision.

22 MJ: Okay. Just on both sides, the court is aware of cases
23 where violations of AR 380-5 have been charged under Article 92 and

1 upheld, *United States v. Amakazi* comes to mind. Is either side aware
2 of any authority that--I guess, any case where a charge under AR 380-
3 5 has been challenged as a punitive regulation?

4 CDC[MR. COOMBS]: No, Your Honor. In fact, there--if you look
5 for like a Westlaw search, and we can give the cases that pull up.
6 There is roughly around six or seven 380-5 cases that come up and
7 each of them were charged under an Article 92. The issues in each of
8 those cases was not whether or not it was a punitive regulation, it
9 just happened to be that was one of the charges. The defense was
10 hoping to give you something where that was an issue that was debated
11 but I do not think it has been debated because it is clear. It is a
12 punitive regulation. And, "Corrective actions and sanctions", makes
13 that very clear as well. So, the defense's position would be the
14 argument that this is not a punitive regulation has never been made.

15 MJ: All right, thank you.

16 ATC[CPT WHYTE]: And Your Honor, the United States has found no
17 case law supporting the fact that 1-21 is punitive.

18 MJ: All right, the court will take this under advisement prior
19 to issuing its ruling with respect to the preemption, Article 92/134
20 issue which the court will issue later today.

21 All right, we have two additional things to address today.
22 We have the government's motion to preclude reference to the damage
23 assessments on the merits and we also have the government's motion to

1 reconsider the court's ruling with respect to ordering the Department
2 of State to produce damage assessments for *in camera* review. Why
3 don't we start with that one. I have the government's motion for
4 reconsideration, Appellate Exhibit 71 and it is dated 26 April 2012.
5 So, that means the parties and I just got it today although we had
6 notice that it was coming. Major Fein, would you like to address the
7 motion?

8 TC: Your Honor, the United States relies on its written motion.

9 MJ: All right, and there is a classified attachment that was
10 filed with that, is that correct?

11 TC[MAJ FEIN]: Yes, ma'am. There are two classified
12 attachments. One, attachment number 1 is--has been produced or given
13 a copy to the defense and filed with the court. Attachment 2 has
14 been filed *ex parte* and is also classified.

15 MJ: All right, and this is a motion that is subject to--on the
16 case calendar for the next Article 39(a) session, is that correct?

17 CDC[MR. COOMBS]: Yes, Your Honor.

18 MJ: Okay. Anything from the defense on this at this time?

19 CDC[MR. COOMBS]: Yes, Your Honor. Not argument but to assist
20 the court in considering this issue in anticipation of it, the
21 defense marked Appellate Exhibit 76 which will give the court the *US*
22 *v. Giles* case that the government is relying upon as well as every
23 cite of *US v. Giles* for that proposition. I apologize, it is

1 Appellate Exhibit 75. The defense does not make any argument with
2 regards to this as far as each of the opinions, it just simply gives
3 you the case, the cite and the general issue within that, ma'am.
4 But, these are the only cases that ever cited *Giles* that address the
5 issue that we are facing here. For the next hearing, we will
6 distinguish why these cases are not significant.

7 MJ: All right. Thank you, I appreciate that.

8 And, I believe that the government also filed an
9 information brief on the difference between--what the government
10 perceives the difference between a damage assessment and an
11 investigation is. That has been marked as Appellate Exhibit 72.

12 Would you like to address that?

13 TC[MAJ FEIN]: Yes, Your Honor. Based off prior sessions on the
14 record and discussions between defense counsel, the prosecution and
15 the government--excuse me, the court, the government's position is,
16 there has been some confusion on what an investigation is or what a
17 damage assessment is. What the prosecution has done is submitted to
18 the court a brief on what the government considers both and explains
19 why one is one, focuses on damage, and one investigates the
20 underlying acts of occurrences either dealing with classified
21 information or not, both criminal and administrative.

22 MJ: All right, so it is the government's position that a damage
23 assessment is different than an investigation?

1 TC[MAJ FEIN]: That is the ultimate conclusion, yes, Your Honor.

2 MJ: Okay.

3 Defense, would you like to address this?

4 CDC[MR. COOMBS]: Just briefly, Your Honor. The defense does
5 not take issue with the fact that a damage assessment is different
6 than an investigation and, that is why we requested both in
7 discovery. For the next hearing, we will address another issue of
8 working papers that might be separate from investigation or damage
9 assessment and argue that they should be found to be within the
10 custody, possession, control of the government under R.C.M.
11 701(a)(2).

12 MJ: All right then, just for purposes of future motions and
13 future proceedings, the court will consider a damage assessment as
14 different from an investigation.

15 TC[MAJ FEIN]: Yes, Your Honor.

16 MJ: Is there anything else we need to address before we take up
17 the government motion?

18 CDC[MR. COOMBS]: No, Your Honor.

19 TC[MAJ FEIN]: No, Your Honor.

20 MJ: All right, I have the prosecution motion for appropriate
21 relief to preclude actual harm or damage from the pretrial motions
22 practice and merits portion of the trial, which is marked as

1 Appellate Exhibit 64. And, I have the defense response to that
2 motion which is marked as Appellate Exhibit 65.

3 Major Fein?

4 TC[MAJ FEIN]: Your Honor, the United States respectfully
5 requests the court preclude the defense for raising or eliciting any
6 discussions references or argument, to include the introduction of
7 any documentary testimonial evidence relating to actual harm or
8 damage or lack thereof from pretrial motions related to the merits
9 portion of the trial and from the merits portion of the trial.

10 Before continuing, the United States does not dispute
11 whether actual damage or harm or lack thereof is relevant on
12 sentencing or pretrial motions practice focused on sentencing.

13 The prosecution offers three distinct reasons why actual
14 harm or damage should be precluded. First, actual harm or damage is
15 not relevant to the charges and their specifications. Second, actual
16 harm or damage or lack thereof is not relevant to any defense
17 available to the accused. And finally, actual harm or damage is not
18 relevant for the purposes offered by the defense prior--both prior to
19 this motion and in their response.

20 Your Honor, first the charges and their specifications do
21 not require the United States to prove that actual harm or damage
22 occurred in its case in chief and therefore should be excluded under
23 M.R.E. 401 and 402. No element of any offense requires actual harm

1 or damage to be proven by the United States. Any actual harm or
2 damage or lack thereof that transpires bears absolutely no
3 relationship to whether the accused, in fact, committed the charged
4 offenses at the time the accused has been charged with, especially
5 since the charges occurred between 1 November 2009 and 27 May 2010
6 because any actual damage or harm or lack thereof would have occurred
7 after the commission of the offense. Whether the accused knew or
8 thought he knew which documents or information would cause harm to
9 the United States is irrelevant to the specific acts for which he is
10 charged or whether they did cause harm. Your Honor, in *Diaz*, the
11 Court of Appeals for the Armed Forces ruled on this issue when they
12 held *Diaz's* thoughts that he was----

13 MJ: Before you do that, read that last sentence you just read
14 to me.

15 TC[MAJ FEIN]: Yes, Your Honor.

16 Your Honor, the United States contends that whether the
17 accused knew or thought he knew which documents and information would
18 cause actual harm to the United States is irrelevant to the specific
19 acts for which he is charged.

20 MJ: Okay.

21 TC[MAJ FEIN]: Your Honor, and *Diaz*, the Court of Appeals for
22 the Armed Forces ruled on this issue, they held that *Diaz's* thoughts,
23 as a Judge Advocate at "GTMO", his thoughts he was complying with the

1 Supreme Court ruling were irrelevant to his act of mailing government
2 information to unauthorized persons in violation of 18 U.S.C. 793(e),
3 *Diaz* at 134.

4 Your Honor, next, actual harm or damage is not relevant to
5 any legally cognizable defense available to the accused. The extent
6 of harm or damage that subsequently transpired after the timeframe of
7 the charged offenses, there is no relationship to any legal defense
8 available to the accused. Similar to *Diaz* and *Huet-Vaughn* there is
9 no conceivable defense that would make actual damage or harm, or lack
10 thereof relevant on the merits therefore it is irrelevant. Although
11 the accused's motive or justification, or as the defense proffers in
12 their response, the process of selecting certain documents over
13 others rather than compromising every classified document at the
14 hands of the accused might be a mitigating factor for sentencing but
15 it is not a defense on the merits especially considering the accused
16 would not have known, or could not have known, about actual damage at
17 the time he was committing the offense.

18 Your Honor, finally, actual harm or damage is not relevant
19 for the purposes offered by the defense both prior to this motion and
20 in their response to this motion. In discovery practice in their
21 response to this motion, the defense argues that damage assessments,
22 which they proffer as the authority for which confirms whether actual
23 damage or harm, or lack thereof occurred are relevant ultimately for

1 two reasons. First, the defense argues that actual harm or damage or
2 lack thereof goes to weighing whether the accused's decision to
3 compromise classified information was reasonable. The defense
4 proffers that the accused's judgment about the classification of
5 documents is relevant on the merits; therefore, any actual damage or
6 lack thereof must be relevant. However, the accused's personal
7 decisions on whether he thought a document would be classified, again
8 is irrelevant. The OCA, the Original Classification Authority, is
9 the ultimate authority for that determination. Under Executive Order
10 13526 a OCA must determine that the unauthorized disclosure of the
11 information reasonably could, prospectively, could be expected to
12 result in damage to the national security and be able to even
13 identify or describe the expected damage. Your Honor, that's section
14 1.1(a) of the Executive Order. The defense continues to argue, at
15 least in their response, the accused had reason to believe his
16 disclosure would not cause harm and they proffer that his actions did
17 not cause harm. The accused is not, nor was he ever, an original
18 classification authority to make that decision. The accused--nor,
19 Your Honor, is there any evidence that he consulted an original
20 classification authority prior to the charged offenses. The accused
21 was a junior analyst and not an OCA. An OCA, who has subject matter
22 experts, and by appointment or position are chartered to make those
23 decisions. As detailed in the written motion, the government's

1 written motion, determination of whether information is or is not
2 classified is within the sole purview of the executive branch and is
3 vested in these senior officials and was not, and is not, with the
4 accused. Your Honor, second, the defense relies on *Diaz* to claim
5 that the case stands for classification alone is not enough to prove
6 *mens rea* for in 18 U.S.C. 793(e) offense. Although CAAF did include
7 in their opinion, "classification alone does not satisfy the *mens rea*
8 requirement of section 793(e)". But, that is not the ruling of the
9 court. CAAF rules that mere classification is not enough to
10 establish the *mens rea* and the government must also provide
11 additional evidence, additional evidence to show that the accused
12 understood the classification and what the classification meant
13 through training or other facts such as in *Diaz*, a Judge Advocate who
14 worked at "GTMO", understood classified computer systems, understood
15 what went into the systems and what was queried from the systems,
16 that was sufficient to prove that he understood the classification.
17 The government is required to provide evidence that it is--excuse me,
18 Your Honor, that ultimately, Your Honor, the government is required
19 to provide evidence that, similar to what the defense is talking
20 about, and what they are proffering, however, it isn't to show that
21 the accused knew no harm would happen, it is simply intent he was on
22 notice and reasonably believed that harm could happen. Based on the
23 accused's expertise and training, as we have heard in previous--from

1 the defense in previous motions during the session, the accused had
2 specialized knowledge about potential impact on classified
3 information and is even listed in the response paragraph 15, page 4
4 that the defense submitted. Your Honor, ultimately CAAF does not
5 hold that actual damage or lack thereof, which occurs after the
6 commission of a crime is relevant for the defense or government to
7 prove--or government to prove whether or not the accused did, or did
8 not, know or should have known about the actual damage that could
9 occur in order to be convicted of 793(e) offense.

10 So in conclusion, Your Honor, the United States
11 respectfully requests that the court preclude the defense from
12 raising or a eliciting any discussions, references, or argument to
13 include the introduction of any documentary or testimonial evidence
14 relating to actual damage or harm, or lack thereof, during the merits
15 portion or the pretrial motions portion focused on the merits.

16 MJ: Major Fein, can I ask you a question. Could you address, I
17 believe the defense also raised the issue of relevance in cross
18 examining the experts?

19 TC[MAJ FEIN]: Yes, Your Honor. The United States is not
20 arguing that the defense should be precluded from ever cross-
21 examining any witness that the government puts on the stand to prove
22 its case.

23 MJ: I hope not.

1 TC[MAJ FEIN]: Not at all, Your Honor. But, what the government
2 is arguing is that the purpose of putting these experts on the stand
3 is to prove the elements of the case, so it is to prove that the
4 document was properly classified at the time of its compromise, at
5 the time that Private First Class Manning made the decision--made the
6 decision to commit the act he is charged with. They can be, and
7 should be, cross examined on those determinations. But, those
8 determinations, under the Executive Order are whether information
9 could cause harm, not whether it did cause harm. And, it would be--
10 it would first and foremost confuse the panel, the court, the
11 ultimate trier of fact, because this decision of whether something is
12 classified is prospective in nature, is whether it could. And
13 whether today the defense does or does not have information that harm
14 was caused, based off of a specific fact, doesn't mean, tomorrow
15 there could be harm or no harm. Again, it is a prospective view, and
16 that they can cross-examine and should cross examine, but it is
17 cross-examining a whether something was properly classified and
18 whether it could, and under what authority in the Executive Order
19 that it was classified.

20 MJ: Okay, thank you.

21 TC[MAJ FEIN]: Yes, ma'am.

22 MJ: Mr. Coombs?

1 CDC[MR. COOMBS]: Yes, Your Honor. Your Honor, the defense
2 requests that you deny the government's motion for two reasons.
3 First, the damage assessments are, in fact, relevant. And, the fact
4 that the damage assessments may show lack of harm is also relevant on
5 the merits. Second, unlike what the government says, the damage
6 assessments or the information from the damage assessments is not
7 unfairly prejudicial to the government under M.R.E. 403. Before
8 getting into those two arguments though, the defense would like to
9 highlight the fact that we believe the motion is premature in that we
10 have not had the benefit of seeing any of these damage assessments.
11 The government has referenced them, but they have fought vigorously
12 not to provide them to the defense. So, it is difficult for the
13 defense to argue relevancy of items that we do not have the ability
14 to even see at this point. Second, their motion is internally
15 inconsistent. It repeatedly states that these damage assessments, if
16 we do get them, will show harm and yet, they fight to prevent the
17 defense from ever referencing them. And obviously, if they did show
18 harm, they would not have to convince us not to reference them. So,
19 you have to, when we are considering replying to this motion, we have
20 to believe the damage assessments actually showed no harm or very
21 little harm. And, when we look at the documents that we have
22 received so far at least the 12 pages of unclassified Brady, it seems
23 to support that position of no harm or little harm. And also, when

1 you just take a look at the fact that these alleged acts occurred
2 over two years ago and it is widely known that there has been no harm
3 that has been pointed to at least that the public is aware of. Then
4 again, that leads the defense to believe these damage assessments
5 must actually be beneficial to my client. It is also overly broad in
6 that they are asking not only to not reference the damage assessments
7 but also the fact that no damage occurred at any point during the
8 merits portion. And, that leads to why the damage assessments and
9 the lack of damage is relevant when it comes to the merits portion.
10 First, whether or not there has been harm and the damage assessments
11 in and of themselves, is relevant to an element of both 793 and the
12 1030 offenses as well as the general Article 134 offense, should it
13 survive. They also are relevant for impeachment of any witness that
14 the government would to put up. With regards to an element both of
15 793 and 1030, the accused is charged with having a reason to believe
16 that the information could be used to the injury of the United States
17 or to the advantage of any foreign nation. The Article 134 offense,
18 ma'am, charges PFC Manning with acting wantonly and causing the
19 charged information to be published on the Internet. The defense
20 should be entitled to argue that by virtue of PFC Manning's
21 experience and training, he knew which documents and information
22 could be used to the injury of United States or to the advantage of
23 any foreign nation because we cannot lose sight of the fact that as

1 an all source intelligence analyst with unlimited access and a TS SCI
2 clearance, PFC Manning had access to a great deal of information that
3 undoubtedly could cause harm to United States. If he did what the
4 government is alleging he did do, he was selective in what he chose
5 to disclose. And, by selected the information that he allegedly did,
6 PFC Manning chose information that he believed could not cause damage
7 to the United States during. The government in one breath wants to
8 call him an expert to where he has the training and then in another
9 breath call him a junior analyst that does not know any better. The
10 defense should be entitled to address the issue of whether or not
11 this information could cause damage and address the reasonableness of
12 PFC Manning's belief if that is, in fact, what we advance, that his
13 belief was accurate. And, the damage assessments help support that
14 belief. Additionally, even though not argued in our motion, but
15 because the 641 offenses obviously are surviving, and not for sure
16 which theory the government is going to go under, if we are going
17 under the substantial interference theory, ma'am, these damage
18 assessments would be relevant to that issue. The damage assessments
19 would show, or should show the level of interference in order to
20 argue that the government has lost the benefit of the property or in
21 some way had its benefit or use of it substantially interfered to
22 support a knowing conversion. So, assuming the government goes
23 forward on theory, the information would be relevant to that. In

1 short, the defense submits that the damage assessments confirmed that
2 PFC Manning did not have a reason to believe the information could
3 cause damage to the United States or be used to the advantage of a
4 foreign nation and further, he did not act wantonly when he chose
5 selectively the items that he did in order to disclose them. The
6 government wants to believe that the classification level of the
7 documents themselves is virtually conclusive on the issue of whether
8 or not this could cause damage. And, they cite several cases for the
9 court to consider. One of them, *United States v. Shaughnessy*, and
10 the other cases have absolutely nothing to do with classification
11 determinations. Although, in fairness to the government, *Shaughnessy*
12 does deal with classification determinations but it is
13 classifications of illegal aliens, not classification of classified
14 information. Military and civilian case law, however, establish
15 firmly that the classification determination is only probative of
16 whether or not the information could cause damage. It is not
17 determinative of that issue. The government correctly supports and
18 cites *US v. Diaz*, that classification alone does not satisfy the *mens*
19 *rea* of the 793(e) but they misread *Diaz*; fundamentally misread *Diaz*.
20 In *Diaz*, the defense was a motive issue. They wanted to raise his
21 motive for why he did what he did as a defense and the court
22 correctly stated that motive has nothing to do with intent. Did you
23 do it or not? Was that your intent? If that is your intent, your

1 motive behind it is not relevant on merits, it may be relevant at
2 sentencing, but not on merits. That is not--*Diaz* does not preclude
3 the defense from attacking the issue of whether or not something
4 could cause damage. And, this instance, when *Diaz* cites the
5 experience level of the individual to know the information could
6 cause damage, in addition to the classification, the defense should
7 not be limited from using that exact same support, the experience of
8 the accused, in order to say it could not cause damage. So, on the
9 one hand the government is saying there is classification and then we
10 are going to show his training and knowledge and collectively that is
11 going to prove, and save the day on, "could cause damage". We should
12 be able to look at classification, his training and knowledge, to say
13 he actually could select information that did not cause damage
14 because classification alone is not determinative. And, the key
15 issue there, which eventually would be subject of judicial notice, is
16 the over classification problem that we have within the government.
17 And, the fact that the current administration has, with the combined
18 support of Congress, has passed the classification act that addresses
19 the problem of over classification with the United States Army--or
20 excuse me, within the government. The fact that we classify a lot of
21 stuff that should not be classified. So, the defense should be
22 entitled to look at that same knowledge, training and experience in
23 order to say that he could selectively choose items that could not

1 cause damage. But in addition to *Diaz*, when you look at the *Morison*
2 case cited by the defense, *Morison* case--in that case, it states, and
3 I quote, "Notwithstanding information may have been classified, the
4 government must still be required to prove that it was, in fact,
5 potentially damaging, "more useful. The fact of classification is
6 merely probative, not conclusive on that issue." As both *Diaz* and
7 *Morison* demonstrate, the government does not get a free pass on the
8 issue of establishing whether or not the information, by
9 classification alone, could cause damage to the United States or aid
10 any foreign nation. Thus, under both the 793, 1030 offenses and the
11 Article 134 charge, in addition to, depending upon the theory that
12 the government goes under for 641, the damage assessments and the
13 lack of damage is relevant and the defense should be able to
14 reference that in order to support PFC Manning's reasonable belief
15 with regards to whether or not this information could be used to the
16 injury of the United States or to the advantage of any foreign
17 nation. So, that is one aspect.

18 The second aspect is these damage assessments are relevant
19 to impeachment. They are, and perhaps by use of an example, that may
20 be the most beneficial way, an OCA gets on the stand and testifies,
21 say for example, the CIDNE database revealed sources and methods and
22 particular sources, and they state that the sources are the reason
23 why this information could cause damage to the United States. Well,

1 the defense knows that the SIGACTs do not reference sources. And, to
2 the extent that there are sources referenced in there, if there is
3 any, they are going to be referenced--true sources will be referenced
4 by number. So, the defense would offer expert witnesses to indicate
5 that no SIGACT would ever reference a source by name, instead it
6 would only reference the source by number. Assuming that fact is
7 true, then the defense I should be able to cross-examine the OCA
8 expert on whether or not the OCA expert knew that the sources were
9 referenced by name at the time that he concluded, or she concluded,
10 that the SIGACT could cause damage to the United States. If the OCA
11 says, "No, I did not know that", obviously that would undercut their
12 determination of whether or not this could cause damage, especially
13 if it was their main reason for why it could.

14 MJ: How does that involve damage assessment? Wouldn't that be
15 involving the evidence itself?

16 CDC[MR. COOMBS]: Not only the evidence itself but the damage
17 assessments--let's say the damage assessments and what we believe,
18 with regards to the information review task force. The damage
19 assessment with that, I am confident, based solely upon the Secretary
20 of State's[sic] admission, and this was something that we put in with
21 the motion to compel discovery, where he said there are no sources
22 and methods compromised. Confident that that information review task
23 force will indicate that sources, names of sources, were not put in

1 SIGACTs. And, the reason why I am confident of that as well, is
2 because of interviewing relevant witnesses and my own experts I know
3 that HUMINT information is not revealed within SIGACTs, it is held
4 much more closely than that. So, the damage assessment would say,
5 hopefully, support that no sources or methods were compromised. So,
6 if that were, in fact, what one of the OCAs got up and testified
7 that, "Hey, these SIGACT were terrible", and talking to the panel
8 that they were terrible because they could reveal sources and methods
9 and that could cause damage to the United States. Well then, we
10 should be able to get up on cross and say, "Are you familiar with the
11 information review task force assessment? You, as an OCA obviously
12 must have reviewed that. Did you see within that damage assessment
13 where they concluded no sources and methods were compromised? Does
14 that affect your opinion?" And, the answer to that wouldn't matter
15 to me because I would have the damage assessment and the panel could
16 make its own independent determination. So, if the expert says,
17 "Okay yeah, that changes my opinion." Obviously, I undercut the
18 expert. If the expert says, "No, it doesn't. I still think they
19 could have given away sources." Well now, it is clear that the
20 expert is kind of out on his own as opposed to what the information
21 review task force concluded. So, the defense should be entitled to
22 that information so we can effectively cross examine the OCA.
23 Otherwise, the OCA can sit up there with impunity and say whatever he

1 wants, or she wants and we are unable to really undercut that because
2 we don't have the benefit of the actual, no kidding, internal review.
3 And, the fact that these things that cause damage, again, the
4 government should be wanting to hand this over. The only reason
5 maybe not, and I would expect that, is if the OCA said, "We are
6 asserting a privilege." Then, that is what they have to abide by but
7 short of that, these items should be, in fact, handed over. The
8 government wants to say that the *ex post* damage assessments cannot be
9 used to impeach an OCA who prepared their classification review
10 because they are talking about what could cause damage and the *ex*
11 *post* damage assessments talk about what did cause damage. But,
12 again, for the reason we just discussed, why would *ex post* damage
13 assessments not be able to used to question the *ex ante* damage
14 determination or possible damage determination of the expert. Why
15 should an OCA be treated any differently than any other witness who
16 takes a stand who, when they raise their right hand and swears to
17 tell the truth, is subject to cross-examination? And that is really
18 a hallmark of our system, the crucible of cross-examination gets to
19 the truth. So, we should be entitled to cross-examine an OCA just
20 like we would cross-examine any other expert. And, if we were
21 talking--take it out of the realm, for a moment, of the OCA and say,
22 this is a medical expert, and they are testifying to whatever their
23 determination is. If we knew there were medical reports out there

1 that actually looked at it, so the medical expert gets up and says,
2 "I think whatever happened could have caused "X" and we know we have
3 medical reports that are *ex post*, that actually tell us whether or
4 not, "X", happened then there would be no question that the defense
5 would get that because then we could use that to undercut the medical
6 expert's testimony. This OCA is no different; is not entitled to any
7 greater deference is because they are an OCA, they are a witness. We
8 should cross-examine them.

9 With regards to unfairly prejudicial, the government, in
10 their motion cites three reasons why they think you should not allow
11 us to have access to this. "It would, a) result in prejudice to the
12 integrity of the proceeding; b) result in prejudice to the United
13 States; or, c) fail the balancing test under M.R.E. 403." The
14 government fails to cite really any cases for you with regards to the
15 balancing test under M.R.E. 403 other than cases that reference when
16 it would be harmful to the accused. With regards to the other issues
17 that they raise, you know, not even knowing prior to this, ma'am, if
18 any judge is going to be able to control the courtroom. And
19 obviously having experience with you now ma'am, I know you can
20 control the courtroom so the issues that they raise as some sort of
21 concern of confusion or, you know, we are going to have terrible
22 issues with closure and referencing all sorts of information, these
23 are things that the court could certainly remedy if they believe any

1 of those things weren't merit. And obviously, if the defense did
2 something, we went out on a limb and we were really causing
3 confusion, then that would--the government should get up and object
4 and the court would make a ruling. So, again, most of their issues
5 that they raise are not issues that we should be deciding pretrial,
6 if at all, during trial. So, for those reasons, ma'am, we would ask
7 that you deny the government's request and in the alternative if you
8 are not for sure on denying the government's request at this point,
9 that you defer ruling until we actually have witnesses; we have the
10 benefit of the damage assessments, we have witnesses and allow them
11 to make their objections if they have any during the trial.

12 Subject your questions, ma'am.

13 MJ: All right, thank you.

14 Government?

15 TC[MAJ FEIN]: Your Honor, if it may please the Court, the
16 United States does believe there is incredible confusion right now
17 what kind of goes to the last point of Mr. Coombs that there should
18 not be confusion, and if there was the court could regulate that
19 confusion. All of the specifications on the charge sheet deal with
20 potential damage. They are written with the word, "could". There is
21 no requirement under any case that supports any of these charges that
22 actual damage is relevant; that the government has to prove damage
23 occurred, let alone it did not occur. So, first Your Honor----

1 MJ: Well, let me just stop you there.

2 Mr. Coombs, is that what you are arguing?

3 CDC[MR. COOMBS]: No ma'am. We are not saying that the
4 government has to prove actual damage at all. In fact, their
5 drafting of the word, "could", is not by accident. That is what 793
6 requires them to prove. So, "could", cause damage. We are not
7 maintaining that the government has to prove actual damage at all.

8 MJ: Okay because I was confused on that issue.

9 TC[MAJ FEIN]: Yes, ma'am, because I guess the next part, ma'am,
10 is that what the defense is ultimately saying is they want to open
11 the door to say that "no damage" could be used to impeach OCA's.
12 Well, the reverse would be that the government then could put actual
13 damage, almost like the effects on a victim, to prove the act
14 actually occurred. So, the reason that--the defense wants to say
15 that they have not received certain damage assessments because they
16 are classified, they're only entitled to *Brady* material that is
17 outside of possession military authorities, they are only going to
18 receive that material under our *Brady* obligation, but just because
19 damage assessments might say damage didn't occur or did occur, it is
20 irrelevant to--completely irrelevant to the actual elements involved
21 in the specs. And, that is where we are trying to keep the focus
22 here. Is whether there could have been damage and it is whether
23 there could have been damage at the time of the commission of the

1 crime. So, the reason Private First Class Manning did or did not do
2 what he has been charged with ultimately goes to his justification
3 and motive. That is why we focused on *Huet-Vaughn* and *Diaz*. Why he
4 did something is irrelevant. How he did it is relevant. That is the
5 actus. That is what the government must prove, but there is no
6 requirement, and not, let alone no requirement, there is no need.
7 And, there is no, I guess, conceivable reason that actual damage
8 would be relevant to proof. Again, it is a time issue.

9 MJ: Well, Major Fein, let me again, make sure I am
10 understanding, it is possible I am not. I understood what the
11 defense is arguing to me that they may potentially raise either a
12 defense of honest and reasonable mistake of fact or the defense would
13 be, "I did not know--I specifically parsed through these documents
14 and picked ones that I did not think could----so, is that really a
15 motive or is that something else?

16 TC[MAJ FEIN]: Ma'am, that is a few things actually. First, it
17 could be motive depending on the context. First--second, his
18 determination, if assuming that was true, it is not an individual
19 Soldier or anyone within the federal government's decision except for
20 an OCA to make a determination whether information was or was not
21 classified or they think it is or is not classified. That is why the
22 government's burden is to prove that he reasonably could know. I
23 mean that is what is written in the spec itself. So, that is the

1 burden on the government is to actually provide the evidence to show
2 that Private First Class Manning had reason to believe. So, yes--we
3 are not arguing that a mistake of fact defense might not be relevant,
4 but what is not relevant to a mistake of fact defense is what
5 occurred after the fact. It is what information Private First Class
6 Manning actually had at the time of the commission of the crime for a
7 mistake defense. Actual damage occurs after the crime is committed
8 and is irrelevant. And more importantly, actual damage or lack
9 thereof, as I was talking about before, Your Honor, briefing, what is
10 odd is that the reason the Executive Order vests in the Original
11 Classification Authorities the power to prospectively classify is
12 because damage can occur at any moment. And, if it is not occurring,
13 there is no damage. So, to argue that no damage occurred at one
14 snapshot in time means that the accused had a mistaken belief at the
15 time committed the crime, which was before the damage did not occur,
16 first, is confusing and ultimately is irrelevant because the next day
17 damage could have occurred. So, this is a slippery slope of
18 continuing to go down one day, "yes", one day, "no", one day, "yes",
19 which is why the government should also be precluded from mentioning
20 actual harm and damage from the merits portion, it is a sentencing
21 issue, and the defense.

22 And, Your Honor, now to speak to cross-examination, first,
23 cross examination is limited to the scope of the direct. If the

1 government does not have to prove actual damage or harm occurred then
2 we are not going to the eliciting from experts, the OCA's or their
3 designees, whether actual damage or harm occurred. We are simply
4 going to elicit from them the facts of the information, the four
5 corners of the document those compromised. "Did you review the
6 facts?" "Yes, I reviewed the facts." And, your determination, go
7 through a foundation, ask them the questions on direct on why it was
8 classified at the time. And then, the ultimate conclusion under
9 their power, "Was it classified at the time?" "Yes." And, any other
10 information about that. But, the reason they can say, "yes", to
11 whether this classified or, "no", I guess, whatever they decide to
12 testify to ultimately, then they have to provide the justification.
13 That justification, under the Executive Order, AR 380-5 and every
14 other promulgating reg within the departments of the executive branch
15 focus on whether it could cause damage. And, to take this to the
16 most reasonable hypothetical it would be--what the defense is arguing
17 is; if this document was classified [the trial counsel held a piece
18 of paper above his head] today and no one disputed it as classified
19 today; I am holding this document and then tonight, before midnight,
20 I was to give this document to an enemy of the United States and this
21 document constitutes intelligence by definition, I was to cause it to
22 be published on the Internet; I was to transmit it to someone
23 unauthorized; I was to steal the document; or, I was going to commit

1 a regulatory violation similar to Charge III specifications, today,
2 knowing what I know today on this document and then tomorrow no
3 damage occurred, it could be the nuclear codes and no damage
4 occurred, that somehow the fact that tomorrow no damage occurred is
5 somehow relevant to whether I, today, held a classified document that
6 was marked classified, that I had no authority to question, on
7 whether I committed the crimes I just listed, that is what the
8 defense is ultimately arguing. That tomorrow's affect somehow is
9 relevant to the time of the commission of the crime, the time on the
10 charge sheet. And, what the government is arguing, that any damage
11 that did or did not occur comes after the requisite *mens rea*. It
12 comes after the *actus*. It comes after the charged offense, therefore
13 is irrelevant to the actual charges and should not--should be
14 precluded from the merits portion of this trial, not the sentencing
15 portion because then we get into motive and intent. That is motive
16 if there was a sifting process that the accused believed, or it gets
17 into true aggravation, mitigation; no damage, mitigation;
18 aggravation, it did occur. And then, at that point, it is absolutely
19 relevant. Those witnesses will be testifying on what did happen to
20 the government or what did not happen to the government and then they
21 could be impeached on those conclusions, not the conclusions of
22 whether it was properly classified and whether the accused had the
23 adequate *mens rea*, the knowledge that it was classified not whether

1 he questioned but whether he had the knowledge and that is the burden
2 of the government to prove.

3 And Your Honor, just the final point is, the defense has
4 asked you--has asked the court to withhold ruling until we go down--
5 until we get further down the road. But, the reason the government
6 is asking for a ruling as soon as possible is that there clearly is
7 confusion even among the parties on what is or is not relevant for
8 the merits. First, this will save time. This will save time in the
9 judicial process if this ruling--if the court is inclined to rule in
10 favor of the government because it will sift the issue and allow both
11 parties to focus on the issues that matter for the trier of fact.
12 There is confusion on the issues and ultimately that will--a ruling
13 today or before the next motions hearing will allow the parties to
14 properly prepare to mount a defense and to understand what the issues
15 are going forward in order to prove and disprove the elements of the
16 crime and prepare for the sentencing case, if there is one.

17 Thank you, Your Honor.

18 MJ: All right.

19 CDC[MR. COOMBS]: Your Honor, just briefly, I just want to
20 address just a couple of things. We are talking about harm occurred
21 tomorrow, several years have gone by from the--or least two have gone
22 by from the alleged acts until now. The fact that the government
23 does not believe that harm, or actual harm, or the damage assessments

1 is relevant on the merits is interesting but is wrong. And to use an
2 example, if we were charging someone with grievous bodily harm, say
3 your act could cause grievous bodily harm; the medical report would
4 obviously be relevant to that. It is interesting that the government
5 would box itself in in this way. If you are saying that something
6 could cause damage, what better proof than actual damage. So, in
7 other words, if I were the prosecutor here, one of the things I would
8 want to show is actual damage to say, "Look, at the time that the
9 stuff was released not only could it cause damage, but we know now it
10 caused really a lot of damage." So, the fact that they would box
11 themselves in and say is not relevant on merits seems, again, to
12 support the idea that there isn't damage or there is minimal damage.

13 But, again, going back to the issue of classification,
14 classification is controlling on how you handled information and on
15 who has access to it. That is what classification is controlling on.
16 And, it is important to know, and Major Fein even stated, that when
17 an Original Classification Authority makes a determination, they are
18 just--they are looking at the information and making their objective-
19 -or, subjective I should say, opinion. And, because we have over
20 classification problems, that subjective opinion is not objectively
21 agreed upon by everybody. So, when an expert, an OCA, subjectively
22 thinks that something could cause damage and therefore classifies it
23 in a particular way, it is really an educated guess. And, that is

1 their requirement to do that because that is their position. Later,
2 when we actually, if it is compromised, and we see what harm came
3 from that, that goes back to whether or not that educated guess was
4 correct or not. So, in our instance here, if we are doing a mistake
5 of fact defense and PFC Manning is saying, "I selected these discrete
6 documents because I believe they could not cause damage. Obviously,
7 that is a defense he can raise and he can support that through not
8 only his own testimony but testimony from other individuals who might
9 share the same belief on the items charged. And then----

10 MJ: How would that be relevant?

11 CDC[MR. COOMBS]: From the standpoint, let us say for the video,
12 the collateral--the video for the Apache helicopter incident. If the
13 defense has a security expert who comes and testifies that he
14 reviewed the video, looked at the video, and then under his
15 determination, even though it is not classified, he believes it could
16 not cause damage to the United States. So, we have a video that even
17 the government agrees is not classified. And, they are trying to
18 argue that it is information that is not classified or sensitive but
19 they are still charging it as a 793 offense so they are going have to
20 have somebody come and testify that that video could cause damage to
21 the United States or could aid any foreign nation. Well, likewise,
22 the defense will have somebody that gets up and says, "No, that video
23 is no different than any other video that is available on the

1 Internet. And, there are hundreds of them. And so, no, it could not
2 cause damage. No, it would not need any foreign nation. Yes, PFC
3 Manning's belief, in my expert opinion, was reasonable." And then,
4 the trier of fact would then have a battle of the experts. So again,
5 using kind of medical determination, you might have that where two
6 experts have differing opinions on the exact same issue and then it
7 is up to the trier of fact to determine which opinion holds more
8 weight.

9 So again, I think this issue is not one in which the
10 government gets a free pass and says, "Well, we got an OCA that says
11 it was properly classified or at least with the video we have
12 somebody," I am sure they have somebody in the wings to say that even
13 though it was not classified, it could cause damage or aid any
14 foreign nation and they'll indicate why they believe that is so. The
15 defense shouldn't have to wait until sentencing, if we get to
16 sentencing, to then question whether or not that is true. It is an
17 element of the offense they have to prove. So, we should be entitled
18 to mount a defense during the merits portion. And again, if the
19 government wants to box itself in and say, "We don't want to
20 reference damage assessments during the merits, that's up to them,
21 but I would be hard-pressed to argue that damage assessments would
22 not be relevant to that issue if they had it when they are trying to
23 argue not only that it could cause damage, but what better proof of

1 that than it did cause damage. And now we can say, you know, the
2 accused's belief was not reasonable, his mistake of fact was not
3 reasonable because, you know, anyone who would see it did, and it
4 actually did. I mean, that would be the government's argument. And,
5 if the defense tried to box them in and say, "Oh no, that is an issue
6 for, you know, sentencing, if we get there." You think that would be
7 overruled.

8 So again, we request that you deny the government's motion
9 in this case and if you are not inclined to do so that you withhold
10 ruling until you have actually had a chance to see the damage
11 assessments and hear the testimony and allow the defense to present
12 its defense.

13 Thank you, Your Honor.

14 ACC: Thank you.

15 Government, it is your motion, you get the final rebuttal.

16 TC[MAJ FEIN]: Very quickly, Your Honor.

17 The government--one of the reasons the government has asked
18 the court, in its other motions that are being decided today, the
19 one--excuse me, the preemption motion, and 104 dismissed
20 specification--Charge I and its Specification be dismissed; to also
21 make findings of the elements of the crimes that have been charged,
22 is because there still seems to be confusion over what is required to
23 be proved and what is not. The specification that Mr. Coombs and the

1 defense is talking about, Specification 2 of Charge II specifically
2 states, this is the second half but, that the accused, "With reason
3 to believe such information could be used to the injury", and if all
4 of the different specifications in regards to the 793 offense and
5 1030 offense have that language, it is not an element. And where the
6 confusion comes in his, a great example is a assault with intent to
7 commit grievous bodily harm, because the element of the crime is to
8 prove that grievous bodily harm occurred and that the intent was
9 there to occur. So yes, you could have harm after the act that could
10 be used to show a broken bone in the face, I could show a fracture to
11 prove that, but that is an element of the crime. It would be like--
12 and, the government recognizes, housebreaking. Once you cross
13 threshold and you had the intent to commit a crime, you can use--the
14 government can use circumstantial evidence of the crimes that are
15 committed after the break-in to prove the intent. But again, that is
16 an element. The only elements that are at play here is that it could
17 cause damage, not that it did cause damage. No requirement for the
18 government to prove, therefore it is irrelevant for the defense to
19 use that either as a defense or to disprove the elements, Your Honor.

20 Thank you.

21 MJ: Well, the element is that the accused had reason to
22 believe, right?

23 TC[MAJ FEIN]: It depends on the specification, yes, ma'am.

1 MJ: Okay. And, we are addressing the elements next time?

2 CDC[MR. COOMBS]: I believe so, yes ma'am, at the next motions
3 hearing.

4 MJ: All right. Well, the Court is going to take this issue
5 under advisement and I will be having certain information for in
6 camera review that will also be helpful.

7 Is there anything else we need to address with respect to
8 this issue?

9 CDC[MR. COOMBS]: No, Your Honor.

10 TC[MAJ FEIN]: No, Your Honor.

11 MJ: All right, what I would like to do is take a recess of
12 about maybe 15 minutes and then come--well maybe about 20 minutes and
13 then come back and issue a ruling on the 134, 92. And then, I will
14 put the court into lunch and then due to some automation issues that
15 Fort Meade was experiencing last evening, the court is going to
16 require a significant amount of time before ruling on the 104 motion.
17 So, I will, depending on what the status of the Internet is today,
18 either put the court in a long recess or take it under advisement and
19 issue my opinion later.

20 Anything else we need to address before we recess the court
21 at this time?

22 CDC[MR. COOMBS]: No, Your Honor.

23 TC[MAJ FEIN]: No, Your Honor.

1 MJ: Okay, court is in recess until, why don't we say 12
2 o'clock.

3 [The Article 39(a) session recessed at 1134, 26 April 2012.]

4 [The Article 39(a) session was called to order at 1203, 26 April
5 2012.]

6 MJ: This Article 39(a) session is called to order.

7 Let the record reflect all parties present when the court
8 last recessed are again present in court.

9 The court is prepared to rule on the defense motion to
10 dismiss Specification 1 of Charge II for failure to state an offense.

11 Defense moves the court to dismiss Specification 1 of
12 Charge II for failure to state an offense--a cognizable offense under
13 Article 134 because it is preempted by Article 134 or in the
14 alternative that the specification must be charged as a violation of
15 Article 92.

16 Government opposes.

17 After considering the pleadings, evidence presented and
18 argument of counsel, the court finds and concludes the following:

19 Factual findings.

20 1) Specification 1 of Charge I alleges that PFC Manning,
21 between on or about 1 November 2009 and on or about 27 May 2010,
22 without proper authority, knowingly gave intelligence to the enemy
23 through indirect means in violation of Article 104, UCMJ.

1 2) Specification 1 of Charge II alleges that PFC Manning
2 wrongfully and wantonly cause to be published on the Internet
3 intelligence belonging to the United States Government having
4 knowledge that intelligence published on the Internet is accessible
5 to the enemy, such conduct being prejudicial to good order and
6 discipline in the armed forces and being of a nature to bring
7 discredit upon the armed forces in violation of Article 134, UCMJ.

8 3) At the time of PFC Manning's alleged unlawful actions,
9 Army Regulation 380-5, Department of the Army Information Security
10 Program was in effect. The regulation is a punitive lawful general
11 order per Paragraph 1-21 which states the following, "1-21.
12 Sanctions. A) DA personnel will be subject to sanctions if they
13 knowingly, willfully, or negligently: 1) disclose classified or
14 sensitive information to unauthorized persons; 2) classify or
15 continued the classification of information in violation of this
16 regulation; 3) violate any other provision of this regulation. B)
17 sanctions can include but are not limited to, warnings, reprimands,
18 suspension without pay, forfeiture of pay, removal, discharge, loss
19 or denial of access to classified information, and removal of
20 original classification authority. Action can also be taken under
21 the Uniform Code of Military Justice for violations of that code
22 under applicable criminal law if warranted."

4) AR 380-5 defines classified information as, "Information and material that has been determined, pursuant to Executive Order 12958 or any predecessor order, to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary or readable form. Sensitive information but unclassified information is defined as information originating from within the department of state which warrants a degree of protection and administrative control and basic criteria for exemption from mandatory public disclosure under the Freedom Of Information Act. Sensitive compartmentalized information is defined as classified information concerning or derived from intelligence sources, methods or analytical processes which is required to be handled within the formal access control system established by the Director of Central Intelligence.

5) Intelligence is defined under Article 104(c)(4) as information that may be useful to the enemy or any of the many reasons that make information valuable to belligerents. Intelligence imports the information conveyed is true or implies the truth at least in part.

The law.

Preemption:

1) The preemption doctrine is explained in paragraph 60(c)(5)(A) of the manual for courts-martial which provides in

1 pertinent part, "The preemption doctrine prohibits application of
2 Article 134 to conduct covered by Articles 80 through 132. For
3 example, larceny is covered in Article 121 and if an element of that
4 offense is lacking, for example intent, there can be no larceny or
5 larceny type offense under Article 121 or, because of preemption,
6 under Article 134. Article 134 cannot be used to create a new kind
7 of larceny offense, but without the required intent, where Congress
8 has already set the minimum requirements for such an offense in
9 Article 121", MCM paragraph 65(a).

10 2) in *United States v. Kick* 7 MJ 82 at 85 Court of Military
11 Appeals 1979, the then Court of Military Appeals, CoMA, stated that,
12 "The doctrine of preemption is defined as the legal concept that
13 where Congress has occupied the field in a given type of misconduct
14 by addressing it in one of the specific punitive Articles of the
15 code, another offense may not be created and punished under Article
16 134 simply by deleting a vital element." The CoMA also stated,
17 "However, simply because the offense charged under Article 134, UCMJ,
18 embraces all but one element of an offense under another Article does
19 not trigger the preemption doctrine."

20 3) Military appellate courts apply a two-pronged test to
21 determine whether Article 134--whether an Article 134 charge is
22 preempted by another Article. Both prongs must be met for preemption
23 to apply. First it must be established that Congress indicated

1 through direct legislative language or express legislative history
2 that particular actions or facts are limited to the express language
3 of an enumerated Article and may not be charged under Article 134,
4 UCMJ. *United States v. Anderson* 68 MJ 378 at 387 Court of Appeals
5 for the Armed Forces 2010. See *Kick*, 7 MJ at 85; *United States v.*
6 *Wright* 5 MJ 106 110111 Court of Military Appeals 1978. Second, it
7 must be shown that the offense charged under Article 134 is composed
8 of a residuum of elements of an enumerated offense under Article--
9 under the UCMJ, excuse me; *Wright* 5 MJ at 111.

10 4) Military courts are extremely reluctant to conclude that
11 Congress intended provisions to preempt an offense in the absence of
12 a clear showing of a contrary intent. The fact that an Article 134
13 offense embraces all but one element of an offense under an
14 enumerated Article does not trigger the preemption doctrine; once
15 again, see *Kick*.

16 5) The issue of whether Congress indicated through direct
17 legislative language or express legislative history that Article 104,
18 would cover a class of offenses in a complete way was addressed by
19 the Court of Appeals for the Armed Forces in *Anderson*. In that case,
20 the government charged the accused with violating Articles 80 and 104
21 UCMJ by knowingly giving intelligence to the enemy and two
22 specifications of attempting to communicate with the enemy. The
23 accused is also charged with violating Article 134 UCMJ by wrongfully

1 and dishonorably providing information on US enemy troop movements to
2 persons to whom the accused thought were Tariq Hamdi and Mohammed,
3 members of the Al Qaeda terrorist network, such conduct being
4 prejudicial to good order and discipline in the armed forces and of a
5 nature to bring discredit upon the armed forces. Court of Appeals
6 for the Armed Forces applied the two-part preemption test and
7 concluded that Article 104 did not preempt an Article 134 offense for
8 distributing sensitive materials to individual not authorized to
9 receive it. First, the CAAF concluded that the legislative history
10 of Article 104 does not clearly indicate that Congress intended for
11 offenses similar to those at issue, i.e. the distribution of
12 sensitive material to individuals not authorized to receive it to
13 only be punishable under Article 104 to the exclusion of Article 134.
14 Therefore, the CAAF concluded that Article 104 and Article 134
15 offenses may encompass parallel facts but the charged offenses are
16 aimed at distinct conduct.

17 Analysis:

18 Preemption

19 [1]] Despite defense's attempt to distinguish this case
20 from *Anderson*, the facts of *Anderson* are sufficiently similar to
21 prove controlling. The Court of Appeals for the Armed Forces, in
22 *Anderson*, concluded that Article 104 did not preempt Article--an
23 Article 134 offense for distributing sensitive material to

1 individuals not authorized to receive it. The accused in *Anderson*
2 provided undercover FBI agents, posing as Al Qaeda operatives,
3 computer diskettes containing classified information on the
4 vulnerabilities of military operations. The accused was convicted of
5 attempting to give intelligence to the enemy, attempting to aid the
6 enemy and conduct prejudicial to good order and discipline.

7 2) In applying the two-part preemption test in this case,
8 the court finds that the charged offense of Article 134 UCMJ in
9 Specification 1 of Charge II is not preempted by Article 104 of the
10 UCMJ. Prong one of the two-part test is not met. There is no direct
11 legislative history or express legislative history to show that
12 Congress demonstrated its intent that Article 104 was to cover a
13 class of offenses in a complete way.

14 3) In applying prong two of the test, the charged Article
15 134 offenses not composed of a residuum of elements of the Article
16 104 offense. Each offense requires a different *mens rea*. The
17 Article 134 offense requires the accused wantonly caused to be
18 published intelligence belonged to the United States Government on
19 the Internet. The Article 104 offense provides that the government
20 to prove that the accused knowingly give intelligence to the enemy
21 and the enemy received it. The Article 134 offense requires the
22 government to show that the accused wantonly published the
23 intelligence on the Internet knowing such intelligence is accessible

1 to the enemy. Wanton is not a residuum of knowing. The Article 134
2 offense punishes the wanton publication of intelligence on the
3 Internet, not giving intelligence to the enemy.

4 4) Article 104 does not preempt the Article 134 offense as
5 charge in Specification 1 of Charge II.

6 The law.

7 Article 92.

8 1) Article 134 UCMJ provides in full as part--in full as
9 follows, excuse me, "Though not specifically mentioned in this
10 chapter, all disorders and neglects to the prejudice of good order
11 and discipline in the armed forces, all conduct of a nature to bring
12 discredit upon the armed forces, and crimes and offenses not capital
13 of which a person subject to this chapter may be guilty shall be
14 taken cognizance of by a general, special or summary court-martial
15 according to the nature and degree of the offense and shall be
16 punished at the discretion of that court.

17 2) violations of customs of the service that are made
18 punishable in a punitive regulation should be charged under Article 2
19 [sic] as violations of the regulation in which they appear. No
20 custom may be contrary to existing law or regulation, explanation to
21 Article 134, part IV, paragraph 60(c)(2)(B).

22 3) Article 92 UCMJ provides for punishment of any person
23 subject to the UCMJ who; one, violates or fails to obey any lawful

1 general order or regulation; two, having knowledge of any other
2 lawful order issued by a member of the armed forces which it is his
3 duty to obey, fails to obey the order; or, three, is derelict in the
4 performance of his duties.

5 4) In *United States v. Borunda* 67 MJ 607 Air Force Court of
6 Criminal Appeals in 2009, the Air Force Court of Criminal Appeals
7 stated that the possession of drug paraphernalia must be charged
8 under Article 92 rather than Article 134 where a punitive regulation
9 prescribes the conduct, citing *United States v. Caballero* 49 CMR 594
10 Court of Appeals--Court of Military Appeals 1975. The Air Force
11 Court of criminal appeals upheld the use of Article 134 to prosecute
12 the appellant, or the accused, for possession of drug paraphernalia
13 where no lawful general order or regulation prescribes such
14 possession concluding that the absence of a lawful general order or
15 regulation charging--in the absence of a lawful general order or
16 regulation, charging officials are at liberty to charge the
17 possession of drug paraphernalia as a violation of Article 92(3),
18 dereliction of duty, or Article 134 UCMJ.

19 Analysis.

20 [1]] If AR 380-5, paragraph 1-21 is not punitive then there
21 is no issue of whether Specification 1 of Charge II is properly
22 charged under Article 92 or Article 134. The court assumes for
23 purposes of this motion, that AR 380-5, paragraph 1-21 is punitive.

2) Specification 1 of Charge II charges the accused with wrongfully and wantonly causing to be published on the Internet intelligence belonging to the United States Government, having knowledge that the intelligence published on the Internet is accessible to the enemy, such intelligence being prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces. The conduct at issue in specification--in the charged Article 134 offense is distinct from an Article 92 offense under AR 380-5, paragraph 1-21(a). AR 380-5 punishes knowing, willful, or negligent disclosure of classified or sensitive information to unauthorized persons. It does not punish the wanton conduct charged in Specification 1 of Charge II and intelligence encompasses more than classified and sensitive information.

3) The question in this case is whether the existence of a punitive regulation governing information security that punishes knowing, willful, and negligent disclosures of classified information to authorized [sic] persons precludes the government from charging an offense under Article 134 that includes a wanton *mens rea*, adds an additional element not included in the 380-5 offense, the accused knew that the intelligence published on the Internet is accessible to the enemy, and punishes the distribution of intelligence, which includes information that does not fall within AR 380-5 where the

1 conduct charged under Article 134 is prejudicial to good order and
2 discipline in the armed forces or service discrediting.

3 4) The court finds that the fact that there is a punitive
4 regulation governing the Army's information security program, AR 380-
5 5 that does not prescribe the conduct charged in Specification 1 of
6 Charge II, wrongful and wanton publication of intelligence on the
7 Internet knowing that such intelligence is accessible to the enemy
8 where such conduct is prejudicial to good order and discipline or
9 service discrediting conduct under Article 134 does not preclude the
10 specification--Specification 1 of Charge II as charged under Article
11 134. This case is distinct from *Borunda* as that case addressed an
12 Article 134 Specification when the specification charged was
13 specifically prescribed in a punitive regulation. Because the
14 conduct charged in Specification 1 of Charge II is not specifically
15 described by AR 380-5, the government is at legal liberty to charge
16 the offense as a violation of Article 92(3) or Article 134, *Borunda*
17 67 MJ at 609 and 10.

18 Ruling.

19 The defense motion to dismiss Specification 1 of Charge II
20 for preemption and failure to state a cognizable defense under
21 Article 134 is denied.

22 All right, and that will be Appellate Exhibit 80.

23 Is there anything else we need to address at this time?

1 CDC[MR. COOMBS]: No, ma'am.

2 TC[MAJ FEIN]: No, Your Honor.

3 MJ: All right. Once again, the court is going to recess. If I
4 come back on the record is going to be at 1600. And, that is going
5 to be dependent upon if the Internet continues to keep going out on
6 me as it has been over the evening.

7 Do the parties wish to come back and talk to me at 1400 and
8 see where we are going?

9 CDC[MR. COOMBS]: Yes, Your Honor.

10 TC[MAJ FEIN]: Yes, Your Honor.

11 MJ: Okay. So just for the gallery, I have a pending opinion
12 that I have not issued yet that I would like to issue today. That is
13 going to depend upon whether I have working automation. So, at this
14 point, I do intend to come back on the record at 1600 and once again,
15 that is going to rise and fall on whether I am capable of issuing
16 that ruling at 1600. If I am not, I am not going to come back on the
17 record. The parties can come back and see me at 1400 and I will
18 advise the parties and the bailiff of whether or not we are going to
19 be coming back on the record for that ruling today.

20 Is that acceptable to the parties?

21 CDC[MR. COOMBS]: Yes, Your Honor.

22 TC[MAJ FEIN]: Yes, Your Honor.

1 MJ: All right, is there anything else we need to address at
2 this time?

3 CDC[MR. COOMBS]: No, Your Honor.

4 TC[MAJ FEIN]: Your Honor, can we also speak briefly right after
5 this session?

6 MJ: Yes, certainly. Anything else we need to address?

7 TC[MAJ FEIN]: No, Your Honor.

8 MJ: Court is in recess.

9 **[The Article 39(a) session recessed at 1219, 26 April 2012.]**

10 **[The Article 39(a) session was called to order at 1616, 26 April**
11 **2012.]**

12 MJ: This Article 39(a) session is called to order.

13 Let the record reflect all parties present when the court
14 last recessed are again present in court.

15 Is there anything we need to address before I issue the
16 ruling of the court with respect to the defense motion to dismiss for
17 failure to state an offense?

18 CDC[MR. COOMBS]: No, Your Honor.

19 TC[MAJ FEIN]: No, Your Honor.

20 MJ: All right, the court is prepared to rule on that motion.

21 The defense moves this court to dismiss The Specification
22 of Charge 1 for failure to state an offense. Alternatively, defense
23 moves to dismiss The Specification of Charge I because the inclusion

1 of the term, "indirectly" in Article 104(2) renders--UCMJ renders
2 that provision unconstitutionally vague and substantially overbroad.

3 The government opposes.

4 The government moves the court to adopt the instructions
5 for Article 104(2), Giving Intelligence to the Enemy in the
6 Department of the Army Pamphlet 27-9, Military Judge's Benchbook,
7 hereinafter called, "the Benchbook".

8 After considering the pleadings, evidence presented and
9 argument of counsel, the court finds and concludes the following:

10 Factual findings.

11 1) The government provided particulars regarding The
12 Specification of Charge I in response to the defense question, "How
13 did PFC Manning knowingly give intelligence to the enemy?" The
14 government responded, "PFC Manning knowingly gave intelligence to the
15 enemy by transmitting certain intelligence specified in a separate
16 classified document to the enemy through the WikiLeaks website."

17 2) In The Specification of Charge I, the accused is charged
18 with giving intelligence to the enemy in violation of Article 104(2).
19 The specification alleges that between on or about 1 November 2009
20 and on or about 27 May 2010, PFC Manning, without proper authority
21 knowingly gave intelligence to the enemy through indirect means. The
22 specification follows the modeled specification in the Manual for

1 Court-Martial, MCM part IV paragraph 28(f)(3), Article 104-Aiding the
2 Enemy-Giving Intelligence to the Enemy.

3 The law.

4 Article 104.

5 1) Article 104(2) makes it a crime for any person who,
6 without proper authority, knowingly harbors, protects or gives
7 intelligence, or communicates, or corresponds with, or holds any
8 intercourse with the enemy either directly or indirectly.

9 2) Article 104(b)(4) provides the following elements for
10 the offense of giving intelligence to the enemy:

11 a) That the accused, without proper authority, knowingly
12 gave intelligence information to the enemy; and

13 b) That the intelligence information was true or implied
14 the truth at least in part.

15 In addition, MCM part IV, paragraph 28(b)(5)(A) through (C)
16 provides the following explanation:

17 a) Nature of the offense. Giving intelligence to the enemy
18 is a particular case of corresponding with the enemy made more
19 serious by the fact that the communication contains intelligence that
20 may be useful to the enemy for any of the many reasons that make
21 information valuable to belligerents. This intelligence may be
22 conveyed by indirect--by direct or indirect means.

1 B) Intelligence imports the information conveyed is true or
2 implies it is true at least in part.

3 C) "knowledge", actual knowledge is required but may be
4 proved by circumstantial evidence.

5 3) Giving intelligence to the enemy under Article 104
6 requires actual knowledge by the accused that he was giving
7 intelligence to the enemy, MCM paragraph 28(c)(5)(C). This is true
8 whether the giving of the intelligence is by direct or indirect
9 means. A person cannot violate Article 104 by acting inadvertently,
10 accidentally, or negligently, *United States v. Olson* 20 CMR 461 ABR
11 1955. The military judge's Benchbook provides instruction for
12 Article 104(2). These instructions do not include instructions to
13 finding knowledge or indirect means.

14 The law.

15 Failure to state an offense.

16 The military is a notice pleading jurisdiction. The charge
17 and its specification is sufficient if it: one, contains the elements
18 of the offense charged and fairly informs an accused of the charge
19 against which he must defend; and two, enables the accused to plead
20 an acquittal or conviction in a bar of future prosecutions for the
21 same offense *United States v. Fosler* 70 MJ 225 Court of Appeals for
22 the Armed Forces 2011. In a motion to dismiss for failure to state
23 an offense is a challenge to the adequacy of the specification and

1 whether the specification alleges, either expressly or by
2 implication, and every element of the offense so as to give the
3 accused notice and protection against double jeopardy, *United States*
4 *v. Amazaki* 67 MJ 666 at 669 and 670, note 8, Army Court of Criminal
5 Appeals 2009 quoting *United States v. Crafter* 64 MJ 209211 Court of
6 Appeals for the Armed Forces 2006.

7 The law.

8 Void for vagueness.

9 1) A motion to dismiss the specification as being void for
10 vagueness implicates the due process clause of the Fifth Amendment.
11 To overcome a void for vagueness challenge, a statute must be
12 reasonably clear to as to provide warning of the type of conduct that
13 is prescribed and provide standards sufficiently explicit to prevent
14 arbitrary and capricious application. A statute is impermissibly
15 vague if it: one, fails to provide people of ordinary intelligence a
16 reasonable opportunity to understand what conduct it prohibits; or
17 two, authorizes or even encourages arbitrary and discriminatory
18 enforcement, *United States v. Schrader* 12 Westlaw 1111654 4th Circuit
19 4 April 2012, quoting *Hill v. Colorado* 530 US 703 at 732 2000; *United*
20 *States v. Amazaki* 67 MJ 666 Army Court of Criminal Appeals 2009.
21 "The more important aspect of the vagueness doctrine is not actual
22 notice but the other principal element of the doctrine, the
23 requirement that the legislature establish minimum guidelines to

1 govern law enforcement. Courts consider any judicial or
2 administrative limiting instruction of a criminal statute in
3 determining whether it is unconstitutionally vague", *Kolender v.*
4 *Lawson* 461 US 352, 355, 357, 358 1983.

5 2) A "knowing" scienter requirement mitigates a law's
6 vagueness, especially with respect to actual notice of the conduct
7 prescribed, *United States v. Moyer* 2012 Westlaw 639277 3rd Circuit
8 2012.

9 The law.

10 Substantially overbroad.

11 1) A statute is facially overbroad when no set of
12 circumstances exists under which it might be valid--it would be
13 valid, *United States v. Salerno* 481 US 739 at 745, 1987. The defense
14 does not challenge Article 104(2) as facially overbroad.

15 2) In the First Amendment context, a statute is overbroad
16 when a substantial number of its applications are unconstitutional
17 when compared to the statute's plainly legitimate sweep, *United*
18 *States v. Stevens* 130 Supreme Court 1577, 2010.

19 Conclusions of law.

20 Failure to state an offense.

21 1) The general intent required by Article 104 is knowledge.
22 This general intent is alleged in the specification.

1 2) Knowledge is a recognized *mens rea* to provide an evil
2 state of mind, *United States v. Morissette* 342 US 246 1952, holding
3 that, "Mere omission from 18 U.S.C. 641 of any mention of intent will
4 not be construed as eliminating that element from the crimes
5 denounced and distinguishing between crimes requiring guilty
6 knowledge *mens rea* from strict liability offenses."

7 3) The defense, in paragraph 13 of its brief argues that,
8 "knowing", is an insufficient *mens rea* and states that, "It is clear
9 that in order to state an offense under Article 104(2), the
10 government must allege that PFC Manning intended to give intelligence
11 to the enemy." "Knowingly", is an evil mind *mens rea*. Article
12 104(2) does not require a specific intent or motive to give
13 intelligence to the enemy.

14 4) The government bill of particulars response to the
15 question: How did PFC Manning knowingly give intelligence to the
16 enemy? That, "PFC Manning knowingly gave intelligence to the enemy
17 by transmitting certain intelligence specified in separate classified
18 document to the enemy through the WikiLeaks website", does not impact
19 whether the specification states an offense. The bill of
20 particulars' response states that the government is prepared to prove
21 the accused had actual knowledge that he was giving intelligence to
22 the enemy.

1 5) The Specification of Charge I includes all of the
2 elements of the offense, fairly informs the accused of the charge
3 against him which he must defend, and protects the accused against
4 double jeopardy.

5 6) The Specification of Charge I states an offense.

6 7) That said, the government request for the court to adopt
7 the instructions for Article 104(2), giving intelligence to the
8 enemy, that are in the Military Judge's Benchbook. The court will
9 give the instructions in the Benchbook but notes that there is no,
10 "knowledge", instruction or instruction of what is meant by,
11 "indirect means". The court proposes to give a knowledge instruction
12 along the lines of, "'knowingly', means giving intelligence to the
13 enemy, under Article 104, requires actual knowledge by the accused
14 that he was giving intelligence to the enemy. This is true whether
15 the giving of intelligence is by direct or indirect means. A person
16 cannot violate Article 104 by acting inadvertently, accidentally, or
17 negligently", see MCM paragraph 28(c)(5)(C), *United States v. Olson*
18 20 CMR 461 ABR 1955. The court proposes to give an instruction on,
19 "indirect means", along the lines of the following, "'indirect
20 means', means that the accused knowingly gave the intelligence to the
21 enemy through a third-party or in some other indirect way. The
22 accused must actually know that by giving the intelligence to the
23 third-party, he was giving intelligence to the accused[sic] through

1 this indirect means." The court invites the parties to propose,
2 "knowledge", and, "indirect means", instructions beyond that the
3 court just described.

4 Conclusions of law.

5 Void for vagueness term: "indirectly".

6 1) The defense of aiding the enemy is not a new or novel
7 offense, *United States v. Olson* 22 CMR 250, 256 CMA 1957. "The
8 offense of aiding the enemy or giving him intelligence is almost as
9 old as warfare itself and traces of what is clearly the conceptual
10 forefather of Article 104 of the Code may be found in the earliest
11 reported military codes", *United States v. Batchelor* 22 CMR 144,
12 1956; "Aiding the enemy has been an offense in every military code
13 since the American Articles of War in 1775."

14 2) The defense argues that the government theory is that no
15 criminal intent is required and that a person could violate Article
16 104(2) by disclosing information on the Internet that might be
17 accessible to the enemy. This is not consistent with the
18 government's response in its bill of particulars.

19 3) The term, "indirect means", described means by which a
20 person knowingly gives intelligence to the enemy. The actual
21 knowledge *mens rea* is the same whether the means of giving the
22 intelligence is direct or indirect. The hypotheticals posed by the
23 defense do not violate Article 104(2) because the person did not have

1 actual knowledge that he or she was giving intelligence to the enemy
2 by indirect means.

3 4) A Soldier of ordinary intelligence would be on notice
4 that transmitting intelligence specified in classified document to a
5 website without authority and with actual knowledge that the enemy
6 used that website is prohibited conduct. The elements that the
7 accused was acting without authority and the *mens rea* requirement of
8 actual knowledge by the accused that he or she is giving intelligence
9 to the enemy does not encourage arbitrary and discriminatory
10 enforcement of the statute.

11 5) The Specification of Charge I, giving intelligence to
12 the enemy by indirect means is not unconstitutionally vague. The
13 court will give instructions to finding, "actual knowledge", and
14 "indirect means".

15 Conclusions of law.

16 Substantially overbroad in violation of the First
17 Amendment.

18 1) The defense argues that Article 104 as charged in The
19 Specification of Charge I is substantially overbroad in violation of
20 the First Amendment because persons making public statements that
21 would be subject to prosecution if the enemy could access it in some
22 form. For the reasons set forth above, the court finds that Article
23 104(2), giving intelligence to the enemy, requires an accused to act

1 without authority, to have actual knowledge that he or she was giving
2 intelligence to the enemy whether that giving is by direct or
3 indirect means. These elements ensure that Article 104(2), giving
4 intelligence to the enemy, is not unconstitutionally overbroad and
5 would not prohibit a substantial amount of constitutionally protected
6 speech.

7 Conclusion.

8 The Specification of Charge I states an offense and is
9 constitutional. The court will provide appropriate instructions to
10 fully inform the factfinder of the elements of the offense and the
11 definitions of, "actual knowledge", and "indirect means". If, at
12 trial, the government does not prove that the accused knew that by
13 giving intelligence by indirect means, he actually knew he was giving
14 intelligence to the enemy, the court will entertain appropriate
15 motions.

16 Ruling.

17 The defense motion to dismiss The Specification of Charge I
18 is denied. The court will adopt the Benchbook instructions for
19 Article 104(2) and will supplement them with additional instructions
20 regarding, "actual knowledge", and "indirect means".

21 Is there anything further that we need to address with this
22 issue?

23 CDC[MR. COOMBS]: No, Your Honor.

1 TC[MAJ FEIN]: No, Your Honor.
2 MJ: Anything further we need to address before we recess the
3 court today?
4 CDC[MR. COOMBS]: No, Your Honor.
5 TC[MAJ FEIN]: No, Your Honor.
6 MJ: Court is in recess.
7 [The Article 39(a) session recessed at 1630, 26 April 2012.]
8 [END OF PAGE]

1 [The Article 39(a) session was called to order at 1010, 6 June 2012.]

2 MJ: This Article 39(a) session is called to order. All right,
3 it appears the first order business we have today is to discuss the
4 individual military counsel request for Major Hurley. Mr. Coombs,
5 would you like to address that?

6 CDC[MR. COOMBS]: Yes, ma'am. On 25 April, my client submitted
7 an IMC request for Major Thomas Hurley. That process--the IMC
8 request was processed through Trial Defense channels and then,
9 subsequently, through the Convening Authority. Major Hurley was,
10 subsequently, then detailed to this case as an IMC counsel.

11 MJ: All right. Thank you. All right, PFC Manning, we've been
12 through this several times over the last few months on discussing
13 your rights to counsel and there have been some that have come and
14 some that have gone. I'd like to go over your rights to counsel with
15 you one more time and make sure that you are represented by the
16 counsel that you want to represent you.

17 Now, you have the right to be represented by Captain
18 Tooman, he's your detailed military defense counsel. He is a lawyer
19 certified by the Judge Advocate General as qualified to act as your
20 defense counsel and he is a member of United States Army Trial
21 Defense Service. His services are provided at no expense to you.
22 You also have the right to be represented by military counsel of your
23 own selection, provided that the counsel you request is reasonably

1 available. If you're represented by military counsel of your own
2 selection, then you're detailed defense counsel would normally be
3 excused. However, you could request that your detailed defense
4 counsel continue to represent you, but that request would not have
5 to be granted.

6 Now, do you understand that?

7 ACC: Yes, Your Honor.

8 MJ: So the documents that Mr. Coombs just described were a
9 request by you for individual military counsel?

10 ACC: Yes, Your Honor.

11 MJ: Okay. In addition to your military defense counsel, you
12 have the right to be represented by civilian defense counsel at no
13 expense to the government. Civilian counsel may represent you along
14 with your military defense counsel, or you could excuse your military
15 counsel and be represented only by your civilian counsel.

16 Do you understand your right to counsel?

17 ACC: Yes, Your Honor.

18 MJ: All right. So, at this point, you have a detailed military
19 defense counsel, you have requested Major Hurley as an individual
20 military defense counsel and that request has been approved, and you
21 have Mr. Coombs as your civilian defense counsel. Are these the
22 three attorneys that you want to represent you?

23 ACC: Yes, Your Honor.

1 MJ: And them, alone?

2 ACC: At this time, yes, Your Honor.

3 MJ: All right. Major Hurley, please announce your detailing
4 and qualifications for the record.

5 ADC[MAJ HURLEY]: Ma'am, I was detailed to this court-martial by
6 the convening authority. I am qualified and certified under Article
7 27(b) and sworn under Article 42(a) of the Uniform Code of Military
8 Justice. I have not acted in any manner which might tend to
9 disqualify me in this case.

10 MJ: Are right. Thank you. And, for the record, that's
11 Appellate Exhibit 85 which contains the request for individual
12 military counsel and the subsequent approvals.

13 All right, moving along, the Court notes that there has
14 been an extraordinary writ that has been filed in this case with the
15 Army Court of Criminal Appeals. That court has not ordered this
16 court to stay these proceedings, so, unless and until that court
17 does, we're going to proceed as scheduled in the scheduling order.

18 Does either side have any comment with respect to that?

19 CDC[MR. COOMBS]: No, Your Honor.

20 TC[MAJ FEIN]: No, Your Honor.

21 MJ: Now, the last Article 39(a) session we held in this case
22 was the 24th through the 26th of April 2012. A number of motions and

1 rulings have been filed since then and I would like to state those
2 for the record now.

3 Beginning with the government motion to reconsider the
4 Court's ruling with respect to the Department Of State damage
5 assessment, has that been marked as an appellate exhibit?

6 TC[MAJ FEIN]: Yes, Your Honor, Appellate Exhibit 86.

7 MJ: All right. I have Appellate Exhibit 86 which is the ruling
8 on the government motion to reconsider the Department of State damage
9 assessment. The government motion, itself, is that also an appellate
10 exhibit?

11 TC[MAJ FEIN]: Yes, Your Honor, Appellate Exhibit 71.

12 MJ: All right. The Court ordered in its 23 March 2012 ruling
13 on the motion--defense motion to compel discovery that the government
14 produce a draft Department of State damage assessment for *ex parte*
15 review--or *in camera* review, excuse me--to determine whether it
16 contained discoverable evidence. The government had asked me on the
17 26th of April, which was the last day of the last Article 39(a)
18 session, for a motion to reconsider that ruling. Now, Major Fein,
19 was that addressed on the record at that point? Did the government
20 articulate its position on the record?

21 TC[MAJ FEIN]: Can I have a moment, ma'am? Your Honor, the
22 government did not request oral argument.

1 MJ: All right. And does the government request any oral
2 argument today?

3 TC[MAJ FEIN]: No, Your Honor.

4 MJ: All right. And for the record, the motion for
5 reconsideration is Appellate Exhibit 71 and the prosecution brief
6 discussing investigations and damage assessments, which was prepared
7 along with it, Appellate Exhibit 72. The Court has issued a ruling
8 in that respect. Defense, did you want to address anything with
9 respect to this issue at this time?

10 CDC[MR. COOMBS]: No, Your Honor.

11 MJ: All right. The ruling of the Court will be as follows and
12 is dated 11 May 2012 at Appellate Exhibit 86: The Court moves--the
13 government moves the Court to reconsider its 23 March 2012 ruling
14 requiring the government, by 18 May 2012, to:

15 1. Disclose to the defense any unclassified information
16 from the Department of State damage assessment that is favorable to
17 the accused and material to guilt or punishment;

18 2. Disclose to the Court any additional unclassified
19 information from the Department of State damage assessment not
20 disclosed to the defense for *in camera* review;

21 3. Identify what classified information in the Department
22 of State damage assessment is favorable to the defense and material
23 to guilt or punishment; and

1 4. Disclose to the Court all classified information in the
2 Department of Defense damage assessment for *in camera* review in
3 accordance with R.C.M. 701(g)(2) or, at the request of government, in
4 *camera* review for limited disclosure under M.R.E. 505(g)(2).

5 The government moves the Court to rule that the State
6 Department damage assessment is a draft and, therefore, any
7 information contained in it is not discoverable because of its
8 speculative nature; the defense opposes. The government has provided
9 the Court and defense counsel with a classified letter from the
10 Department of State with background information explaining the draft
11 nature of the DoS damage assessment. The government has also
12 provided the Court with the classified DoS damage assessment for *in*
13 *camera* review to rule on this motion. The Court has examined both
14 the classified letter and the classified Department of State damage
15 assessment and finds that the Department of State damage assessment
16 is a draft damage assessment. The fact that it is a draft does not
17 make the draft speculative or not discoverable under Rule for Courts-
18 Martial 701. Ruling: the government motion to reconsider the
19 Court's ruling of 23 March 2012, with respect to Department of State
20 damage assessment is granted. Having reconsidered the 23 May 2012--
21 excuse me, the 23 March 2012 ruling, the government motion to find
22 the Department of State damage assessment is not discoverable is

1 denied. The government will comply with the 23 March 2012 ruling of
2 the Court.

3 And has that damage assessment been available to the
4 defense?

5 TC[MAJ FEIN]: Yes, Your Honor.

6 MJ: Any issues?

7 CDC[MR.COOMBS]: No, Your Honor.

8 MJ: All right. The government, then, requested that the Court
9 conduct *in camera* reviews of the DIA Information Review Task Force
10 Final Report and the WikiLeaks Task Force Report and proposed
11 substitutions in accordance with Military Rule of Evidence 505(g)(2)
12 and that prosecution disclosure to the Court is Appellate Exhibit
13 125. The defense then moved for--to require non-*ex parte* filing by
14 the government and that is Appellate Exhibit 106. And that was filed
15 on 22 May 2012 and that was not a motion that was on the original
16 trial schedule. As such, the government requested a continuance in
17 responding and that was dated the 23rd of May 2012.

18 The defense opposed the prosecution request for a
19 continuance and that is Appellate Exhibit 108. And the Court ruled
20 on that request on the 24th of May and that is Appellate Exhibit 124.
21 And the ruling was as follows:

22 On 18 May 2012, the government made disclosures to the
23 Court and provided notice of intent, in accordance with M.R.E.

1 505(g) (2) to file *ex parte* motions for the Court to conduct an *in*
2 *camera* review and authorize a substitution of the classified DIA
3 Information Review Task Force (IRTF) Final Report and a substitution
4 for the classified WikiLeaks Task Force Report.

5 2. On 22 May 2012, defense filed a motion requesting the
6 Court order the government to provide a non-*ex parte* version of its
7 motion pursuant to M.R.E. 505(i). This motion was not on the Court's
8 schedule and calendar for the 6th through 8th of June 2012 motions.

9 3. On 22 May 2012, via email, the Court ordered the
10 government to respond by 24 May 2012. Also via email, the government
11 requested leave of the Court to respond by 29 May 2012. On 23 May
12 2012, the Court granted the government's request via email and also
13 extended the deadline for the defense to respond to the government's
14 disclosures until 1 June 2012. On 23 May 2012, the Court ordered the
15 government to put their e-mail request in a motion. On 23 May, the
16 government filed a motion for leave to respond by 29 May 2012. Also
17 on 23 May 2012, the defense filed a request opposing the motion.

18 5. The Court's *in camera* review of the DIA Information
19 Review Task Force (IRTF) Final Report and the WikiLeaks Task Force
20 Report will not be stayed.

21 Ruling: The Court modifies its email grant of the
22 government's request for an extension of time to respond as follows:
23 one, the government response is due by COB 28 May 2012; two, the

1 Court will rule on the defense motion on 29 May 2012; three, should
2 the Court rule in favor of the defense, the government will give the
3 defense a non-ex parte version of its motion on 30 May 2012. The
4 defense response to the government's motion is due on 1 June 2012.
5 Issues regarding the DIA Information Review Task Force (IRTF) Final
6 Report and the WikiLeaks Task Force Report will be addressed at the
7 39(a) session, 6 to 8 June 2012. Ordered on the 24th day of May
8 2012.

9 On the 28th of May 2012, the prosecution filed a response
10 to the defense motion to require a non-ex parte filing. On 29 May
11 2012, the defense filed a reply. And on the 29th of May, the Court
12 ruled on the issue. Does either side desire to supplement their
13 briefs?

14 ADC[MAJ HURLEY]: The defense does not.

15 TC[MAJ FEIN]: One moment, Your Honor. No, Your Honor.

16 MJ: On 29th of May, the Court ruled on that motion and the
17 ruling was as follows:

18 On 18 May 2012, the government made disclosures to the
19 Court and provided notice of intent to file ex parte motions for the
20 Court to conduct an in camera review and authorize a substitution of
21 the classified DIA Information Review Task Force Final Report and a
22 substitution for the classified WikiLeaks Task Force Report. The
23 government filed the ex parte motions with the Court. On 22 May

1 2012, the defense moved the Court to require the government to file a
2 non-ex parte version of its affidavit IAW M.R.E. 505(g) (2) and M.R.E.
3 505(i) (4) (a). On 28 May 2012, the government filed an opposing
4 response. On the 29th of May 2012, the defense filed a reply. On 28
5 May 2012, the government filed a--excuse me. After considering the
6 pleadings, evidence presented and argument of counsel, the Court
7 finds and concludes as follows:

8 1. M.R.E. 505(g), Disclosure of Classified Information to
9 the Accused, provides procedures when the government agrees to
10 voluntarily disclose classified information to the defense.

11 2. M.R.E. 505(g) (2), Limited Disclosure, mandates that the
12 military judge, upon motion of the government, shall authorize:

13 A. Deletion of specific items of classified information
14 from documents to be available to an accused;

15 B. Substitutions of a portion or summary of the
16 information for such documents; or

17 C. Substitution of a statement admitting relevant facts
18 unless the military judge determines the disclosure of classified
19 information, itself, is necessary to enable an accused to prepare for
20 trial. The government's motion and any material submitted in support
21 thereof shall, upon request of the government, be considered by the
22 military judge *in camera* and shall not be disclosed to the accused.

1 3. The defense cites the Navy Marine Court of Military
2 Review's decision in *United States v. Lonetree* 31 MJ 849, Navy Marine
3 Court of Military Review, 1990, affirmed 35 MJ 396, Court of Military
4 Appeals, 1992, for the proposition that *in camera* review for
5 substitutions under M.R.E. 505(g)(2) are controlled by the procedures
6 outlined in M.R.E. 505(i), *Lonetree* 31 MJ 857.

7 4. M.R.E. 505(g)(2) provides specified procedures when the
8 government voluntarily discloses classified information, but seeks a
9 limited disclosure to the defense. The government is not required to
10 make a claim of privilege prior to making a motion for limited
11 disclosure in accordance with M.R.E. 505(g)(2). Nothing in M.R.E.
12 505(g)(2) states that an *in camera* proceeding under M.R.E. 505(i) is
13 required for aor voluntary limited disclosure of classified
14 information by the government. Other provisions of M.R.E. 505
15 identify when *in camera* proceedings under M.R.E. 505 apply. See
16 M.R.E. 505(f). M.R.E. 505(i) applies when the government has invoked
17 a claim of privilege under M.R.E. 505(c), M.R.E. 505(g)(3)(b),
18 invoking M.R.E. 505(i) where a privilege has been invoked under
19 R.C.M. 914 and M.R.E. 505(h)(4) prohibiting the defense from
20 disclosing information until the government has been offered a
21 reasonable opportunity to seek a determination under M.R.E. 505(i).

22 5. M.R.E. 505(g)(2) is derived from section four of the
23 Classified Information Procedures Act, CIPA. See MCM M.R.E.

1 505(g)(2) analysis, A 22 to 24. Federal courts interpret section
2 four of the CIPA as authorizing the government to provide *ex parte*
3 filings to the Court for limited disclosure without invoking a claim
4 of privilege. See *US v. Mejia* 448 F. 3rd 436 at 457 DC Circuit,
5 2006.

6 6. M.R.E. 505(i) does not apply to voluntary limited
7 disclosure by the government of classified information. The
8 procedures of M.R.E. 505(g)(2) apply. To the extent the Navy Marine
9 Court of Military review in *Lonetree* states otherwise, the Court
10 disagrees.

11 7. The 18 May 2012 prosecution disclosure to the Court
12 provides the defense and the public with notice of what *in camera*
13 motions the government intends to file. In order to ensure that the
14 defense and the public have notice of the general nature of the
15 proposed substitutions proposed by the government and the national
16 security interests the government seeks to protect with
17 substitutions, the government shall file an unclassified redacted
18 version of its *ex parte* motions. The government is not required to
19 submit the proposed substitutions to the defense.

20 8. On 14 February 2012, the defense filed an *ex parte*
21 supplement for the Court to consider in ruling on the defense motion
22 to compel discovery; that would be Appellate Exhibit 9. On 15 March
23 2012, the Court ruled it would not consider the *ex parte* supplement

1 in deciding the defense motion to compel discovery, but the Court
2 would consider the *ex parte* supplement at the request of the defense
3 when conducting *in camera* reviews in accordance with M.R.E. 505.

4 9. The defense will advise the Court by 1 June 2012 if the
5 defense desires the Court to consider the *ex parte* supplement when
6 conducting the M.R.E. 505(g)(2) *in camera* reviews requested by the
7 government.

8 Ruling: 1. The defense motion to require the government
9 to submit non-*ex parte* affidavits is granted in part. The government
10 will provide the Court and the defense with an unclassified redacted
11 version of its *ex parte* filing no later than 30 May 2012. It
12 describes the general nature of the proposed substitutions and the
13 national security interest the government seeks to protect with
14 substitutions.

15 2. The defense will advise the Court no later than 1 June
16 2012 if the defense requests the Court to consider the *ex parte*
17 supplement when conducting the M.R.E. 505(g)(2) *in camera* reviews.

18 All right. The Court did receive a response from the
19 defense on 1 June 2012 and that would be--I believe it is a separate
20 appellate exhibit, is that correct?

21 TC[MAJ FEIN]: That's correct, Your Honor, it's Appellate
22 Exhibit 160.

1 MJ: All right. There should also be an additional continuance
2 request that I granted. All right. For the record, the government
3 requested a continuance from the 30th of May to the 31st of May to
4 provide the Court and the defense with an unclassified and redacted
5 version of the *ex parte* DIA filing. The reasons for the request are
6 set forth in the government's motion. The government's motion is
7 Appellate Exhibit 127 and the ruling of the Court granting the
8 continuance--the defense didn't object--is Appellate Exhibit 126.

9 All right. I have the defense response here at Appellate
10 Exhibit 116. And the redacted filings by the prosecution with
11 respect to the substitutions are Appellate Exhibits 114 and 115.
12 Does either side desire to supplement the record on this issue?

13 CDC[MR.COOMBS]: The defense does not.

14 TC[MAJ FEIN]: I just want clarification, for the record. There
15 were actually three redacted versions that were submitted: there was
16 the two original and the original filing and after the request for
17 extension of time there was a supplemental that would have been
18 marked as Appellate Exhibit 115 and that had an additional redacted
19 version with less redactions.

20 MJ: All right. I have Appellate Exhibit 114, Appellate Exhibit
21 115----

22 TC[MAJ FEIN]: 114 should have two sets of motions with
23 redactions.

1 MJ: All right, it does.

2 TC[MAJ FEIN]: Yes, ma'am, and then 115 should have one
3 additional.

4 MJ: All right. Why don't you explain to me what the difference
5 is between the Appellate Exhibit 115 and 114?

6 TC[MAJ FEIN]: Yes, ma'am. Appellate Exhibit 114 was the
7 original disclosure the government made to the Court and defense with
8 the redactions that could be approved by the Court's suspense, so the
9 government provided the most redacted version that was approved
10 immediately. The government requested an extension of time in order
11 to have one more day to get the approval from the equity holder to
12 turn over to the defense more information unredacted and we received
13 that approval the next day and then did a supplemental filing of the
14 exact same document from the day before with less information
15 redacted.

16 MJ: All right. Thank you. All right. The Court is prepared
17 to rule on this issue unless either side has anything further to
18 present.

19 TC[MAJ FEIN]: Your Honor, the government just has a short--
20 would like a short moment to give our--give the government's position
21 on the defense's motion--the defense's response to the government's
22 motion for authorization of a substitution. First and foremost, the
23 government contends that M.R.E. 505 and CIPA section four does not

1 contemplate the defense filing a response or contesting a
2 government's motion under 505(g)(2) versus invocation of a privilege
3 under 505(i). The same cases cited by the Court in the Court's order
4 to approve the *ex parte*, unredacted, unclassified versions of the
5 motions, *Mejia*, the DC Circuit Court held that the defense's absence
6 from the *ex parte* review does not unfairly prejudice the accused.
7 There are other *in camera* proceedings under CIPA section four where
8 the accused is entitled--especially entitled to argue and not take *in*
9 *camera* proceedings under 505(i)--well, under section five of CIPA or
10 505(i) for the military. So, ultimately, we think it's inappropriate
11 for the defense to be able to file this response and to be considered
12 by the Court. The only reason the government hasn't contested this
13 now--or prior to this moment, is because the defense was on notice
14 based off the Court's original order, 23 March, for the government to
15 make this filing, so they did have the ability to respond. But it is
16 conceivable that the government might have future filings in this
17 case or any other case under M.R.E. 505 or CIPA where the
18 information--even the fact the government's filing--should not be
19 disclosed to the defense unless there's information the Court orders
20 to be produced.

21 MJ: All right. Defense, do you have a position on that?

22 ADC[MAJ HURLEY]: Our first response would be does the Court
23 intend to consider Appellate Exhibit 116 in making its determination?

1 MJ: And that would be Appellate Exhibit 116? Is----

2 ADC[MAJ HURLE]: Our response.

3 MJ: ---your response? Yes.

4 ADC[MAJ HURLE]: You will?

5 MJ: Yes.

6 ADC[MAJ HURLE]: All right. Thanks, ma'am. Then we have

7 nothing further.

8 MJ: All right. I believe my review of federal case law--

9 there's not a lot of military case law directly on point that I've

10 seen, but federal case law allows--well, the government is correct;

11 the defense does not have a right to look at the government's

12 submissions and look at the substitutions. The defense does have the

13 right to, *ex parte*, ask the Court to look at certain things with

14 respect to what defense theory of the case is and, when conducting

15 the *in camera* review, look at it, basically, with the eye of the

16 defense counsel, to the extent that the Court can. And as the Court

17 looks at Appellate Exhibit 116, the defense has asked the Court to

18 consider a number of criteria in conducting its review and the Court

19 has done that and the Court will continue to do that when conducting

20 reviews under Military Rule of Evidence 505(g)(2).

21 Anything further from either side?

22 TC[MAJ FEIN]: No, Your Honor.

23 ADC[MAJ HURLE]: No, ma'am.

1 MJ: All right. Ruling: Defense motion to compel discovery,
2 damage assessments, Department of State DIA, IRTF, and CIA

3 On 23 March 2012 the Court ordered the government, by 18
4 May 2012, to disclose damage assessments by the DIA Information
5 Review Task Force, IRTF, the Department of State, DoS, and the
6 Central Intelligence Agency, CIA, to the Court for *in camera* review
7 in accordance with R.C.M. 701(g)(2).

8 2. On 18 April 2012, the defense moved the Court to find
9 that the above damage assessments are in the possession, custody, and
10 control of military authorities and discoverable as material to the
11 preparation of the defense, IAW R.C.M. 701(a)(2). On 26 April 2012,
12 the government requested the Court to reconsider its ruling with
13 respect to the Department of State damage assessment because the
14 damage assessment is a draft and, therefore not discoverable. On 11
15 May 2012, the Court denied the government's motion. On 18 May 2012,
16 the government filed two, classified *ex parte* motions with the Court
17 to authorize redactions for the DIA, IRTF Final Report and the
18 WikiLeaks Task Force Report. On 22 May 2012, the defense moved the
19 Court to order the government to provide a non-*ex parte* version of
20 this motion and proceed under M.R.E. 505(i). On 29 May 2012, the
21 Court granted the defense motion in part. On 1 June 2012, the
22 defense filed its response to the government motions for
23 authorization of a substitution and asked the Court to consider the

1 following factors in conducting its M.R.E. 505(g)(2) *in camera*
2 reviews:

3 A. The extent of the redactions in substitutions;

4 B. Has the government narrowly tailored the substitutions
5 to protect a government interest that has been clearly and
6 specifically articulated?

7 C. Does the substitution provide the defense with the
8 ability to follow up on leads the original document would have
9 provided?

10 D. Did the substitutions accurately capture the
11 information within the original document?

12 E. Is classified evidence necessary to rebut an element of
13 the 22 charged offenses, bearing in mind the government's very broad
14 reading of many of these offenses?

15 F. Does the summary strip away the defense's ability to
16 accurately portray the nature of the charged leaks?

17 G. Did the substitutions prevent the defense from fully
18 examining witnesses?

19 H. Did substitutions prevent the defense from exploring
20 all viable avenues for impeachment?

21 I. Does the government intend to use any of the
22 information from the damage assessments? If so, is this information
23 limited to the summarized document provided by the government? If

1 the information intended to be used by the government is not limited
2 to the summarized document, does the defense, in fairness, need to
3 receive declassified portions of the document to put the government
4 evidence in proper context?

5 J. Does the original classified evidence present a more
6 compelling sentencing case than the proposed substitutions by the
7 government?

8 K. Do proposed substitutions prevent the defense from
9 learning names of potential witnesses?

10 L. Do the substitutions make sense such that the defense
11 will be able to understand the context?

12 M. Is the original classified evidence necessary to help
13 the defense in formulating defense strategy and making important
14 litigation decisions in the case?

15 N. Is it unfair that the government had access to the
16 unclassified version of the damage assessment and the defense did
17 not? Does that provide a tactical advantage to the government?

18 After considering the pleadings, evidence presented, and
19 argument of counsel and after conducting *in camera* review of the DIA
20 IRTF Final Report and the WikiLeaks Task Force Report, considering
21 the factors requested by the defense, the Court finds and concludes
22 the following:

1 Department of State Damage Assessment: On or about 18
2 April 2012, the government produced the Department of State damage
3 assessment to the Court for *in camera* review and requested
4 reconsideration of its 23 March 2012 order. On 11 May 2012, the
5 Court denied the government's request for reconsideration and on 18
6 May 2012, the government advised the Court that the government would
7 produce a draft report without redactions to defense counsel and
8 their security experts. As such, the defense motion to compel the
9 DoS damage assessment and to find it discoverable under R.C.M.
10 701(a)(2) is moot.

11 2. DIA Information Review Task Force, IRTF: on 18 May
12 2012, the government produced the IRTF Final Report to the Court for
13 *in camera* review and substituted final report with proposed
14 redactions IAW M.R.E. 505(g)(2). The Court conducted an *in camera*
15 review of the original IRTF Final Report and the proposed
16 substitution considering the factors requested by the defense and
17 finds:

18 A. Whether evaluating the substitutions under R.C.M.
19 701(a)(6) or R.C.M. 701(a)(2) the redacted substitute is sufficient
20 for the defense to adequately prepare for trial and represents an
21 appropriate balance between the right of the defense to discovery and
22 the protection of specific national security information. The

1 redactions are minor and limited in scope. The government is
2 releasing the report almost in its entirety.

3 B. The redactions are not favorable to the accused,
4 material to the preparation or the defense, or necessary to enable
5 the accused to prepare for trial. Each of the redactions constitutes
6 specific classified information. The redactions are necessary to
7 protect national security and particular sources and methods. The
8 government will disclose the redacted DIA IRTF report to the defense.
9 When will that be made available?

10 TC[MAJ FEIN]: Excuse me, Your Honor. The report will be made
11 available immediately, Your Honor, at the DIA Headquarters.

12 MJ: All right. Then if I keep in my order "by close of
13 business today," that's doable?

14 TC[MAJ FEIN]: Other than there's a geography issue, yes, ma'am.

15 CDC[MR.COOMBS]: Just with regards to that, ma'am, because we do
16 have our defense security experts here--unless there is some reason
17 why we couldn't view the redacted DIA report that the Court currently
18 has, here, with our defense security experts and the government
19 security expert, that would make it a much more easier task for the
20 defense to review this document in a timely fashion. Otherwise, we
21 would have to travel, apparently, to DIA and coordinate with our
22 security experts the time to do that; to review the document.

1 MJ: Government, why don't you coordinate with DIA and see if
2 that is a viable option for them.

3 TC[MAJ FEIN]: Yes, ma'am.

4 MJ: And remind--advise them that the document will remain with
5 the Court.

6 TC[MAJ FEIN]: I'm sorry, ma'am?

7 MJ: That the document will remain with the Court.

8 TC[MAJ FEIN]: Yes, ma'am.

9 MJ: All right. CIA--the government completed a review of the
10 CIA WikiLeaks Task Force report for evidence favorable to the accused
11 and material to guilt or punishment; the government found none. The
12 government filed an *ex parte* motion for *in camera* review by the Court
13 IAW M.R.E. 505(g) (2) to determine whether a proposed government
14 substitution shall be disclosed to the defense or whether disclosure
15 of the classified information itself is necessary to enable the
16 accused to prepare for trial. The Court has conducted an *in camera*
17 review of the classified information considering the factors
18 requested by the defense. The government substitute--let me ask you
19 a question government: did--before I go here, did you find, when you
20 reviewed that document, that there was *Brady* material in there?

21 TC[MAJ FEIN]: Can we have a moment, ma'am?

22 MJ: Yes.

23 TC[MAJ FEIN]: Ma'am, can we have a short recess? 5 minutes?

1 MJ: Any objection?

2 CDC[MR.COOMBS]: No objection, Your Honor.

3 MJ: All right. Why don't we--10. Court is in recess until 5
4 minutes to 11.

5 [The Article 39(a) session recessed at 1047, 6 June 2012.]

6 [The Article 39(a) session was called to order at 1102, 6 June 2012.]

7 MJ: This Article 39(a) session is called to order. Let the
8 record reflect that all parties present when the Court last recessed
9 are again present in court. Major Fein, I'm looking through my
10 notes, I believe that I was advised by the government that there was
11 no unclassified information that constituted *Brady* material, is that
12 correct?

13 TC[MAJ FEIN]: That is correct, Your Honor.

14 MJ: Okay. And the classified material--it contains, though.

15 TC[MAJ FEIN]: Your Honor, your question was: Is *Brady*
16 material--there is not unclassified material? The CIA has approved a
17 portion of the WTF report which includes any *Brady* material that was
18 found and we've identified that for the summary.

19 MJ: All right. So, then, to continue on with the ruling, the
20 government found no unclassified information in its review of the
21 WikiLeaks Task Force report favorable to the accused and material to
22 guilt or punishment. The government filed an *ex parte* motion for *in*
23 camera review by the Court IAW M.R.E. 505(g) (2) to determine whether

1 a proposed government substitution shall be disclosed to the defense
2 or whether disclosure of the classified information, itself, is
3 necessary to enable the accused to prepare for trial. The Court has
4 conducted an *in camera* review of the classified information
5 considering the factors requested by the defense. The government
6 substitute discloses *Brady* and R.C.M. 701(a)(6) material, but not
7 material under R.C.M. 701(a)(2). The Court does not find at this
8 time that the proposed substitute is sufficient. The Court will meet
9 *ex parte* with government counsel in an area appropriate for review of
10 classified information. The Court reporter will transcribe the
11 classified proceedings.

12 Ruling: The classified motions by the government to
13 voluntarily provide a limited disclosure under M.R.E. 505(g)(2) of
14 the DIA IRTF Final Report is granted. The Court finds the
15 substitution, as currently drafted, is not sufficient under M.R.E.
16 505(g)(2) and holds the decision in abeyance pending the *ex parte*
17 proceeding with the government and review of what the government
18 intends to introduce and not introduce in their sentencing case.

19 I will go ahead and have marked--this ruling marked as the
20 next appellate exhibit in line. All right, that will be Appellate
21 Exhibit 128. All right. On 30 May 2012--well, first of all,
22 anything further on that issue from either side?

23 CDC[MR.COOMBS]: No, Your Honor.

1 TC[MAJ FEIN]: No, Your Honor.

2 MJ: All right. Before we get to 30 May 2012, Government, will
3 you please describe for the record disclosures you've given the Court
4 between the last Article 39(a) session and this Article 39(a)
5 session?

6 TC[MAJ FEIN]: Yes, Your Honor. May we have a moment?

7 MJ: Yes, please.

8 TC[MAJ FEIN]: Your Honor, I apologize. For clarification,
9 since the last motions hearing, or since 30 May?

10 MJ: Since the last motions hearing.

11 TC[MAJ FEIN]: Yes, Your Honor.

12 MJ: I haven't--I believe there was one on the 2nd of May?

13 TC[MAJ FEIN]: Yes, ma'am, and forward. Your Honor, on 2 May,
14 the United States disclosed to the Court and to the defense the
15 response that's required under the Court's order dated 23 March--
16 discovery order on whether the CIA had any forensic results or
17 investigative files contained within the agency related to this case.
18 Additionally, in May--excuse me, Your Honor. Additionally, Your
19 Honor, on 30 May, the prosecution made the disclosure to the defense
20 pursuant to what we just discussed which was the *ex parte* motion, the
21 unredacted, unclass--or redacted unclassified motions. Additionally,
22 Your Honor, as we previously discussed, on 31 May, the prosecution
23 disclosed in a supplemental disclosure the updated redaction. And

1 then, Your Honor, on--additionally, Your Honor, on 31 May, the Court
2 [sic] provided notice for a disclosure to the Court identifying that
3 the NCIX, National Counter-Intelligence Executive, did have a draft
4 damage assessment that qualified as a draft under the 11 May court's
5 order for the Department of State.

6 MJ: All right. This is probably a good time to move into the
7 defense motion to compel discovery 2; that was filed at the last
8 session.

9 TC[MAJ FEIN]: Yes, ma'am, that is Appellate Exhibit 96.

10 MJ: All right that was filed--excuse me--on 10 May 2012. It's
11 Appellate Exhibit 96. 97 is the prosecution's response. 98 is the
12 defense reply. And the filing was the 10th of May, the response was
13 the 24th of May. The reply was the 29th of May. The defense filed
14 a supplement on the 30th of May 2012. The prosecution then filed a
15 supplement to the defense motion to compel discovery on 31 May 2012,
16 Appellate Exhibit 100, and the defense reply to the prosecution
17 response to supplement was page [sic] 101. Now, part of the defense--
18 -I'm sorry, part of the defense motion to compel discovery 2 was
19 asking for a witness from the Department of State if the position of
20 that department was there were no other damage assessments other than
21 the draft that was conducted. The government asked for a telephonic
22 R.C.M. 802 conference to discuss and basically to clarify some issues
23 and the Court held that with the parties on 30th of May 2012.

1 Government, would you like to describe, for the record, what you were
2 seeking clarification of?

3 TC[MAJ FEIN]: Yes, Your Honor. In an email from the Court--
4 Your Honor, based on the email from the Court for the government to
5 produce a witness from the Department of State to testify about the
6 damage assessments. The government sought clarification because by
7 the time that we received that email or the email was sent, the
8 Department of State had already made the damage assessment available
9 through the prosecution to the defense. So, the government needed
10 clarification on that issue, if that was the scope of the testimony
11 that that Department of State witness who'd be testifying about and
12 if that was the scope then we could--the government could work with
13 the Department of State to obtain a proper witness to testify to that
14 matter.

15 MJ: All right. And, during that telephonic R.C.M. 802
16 conference where the counsel for both sides, Mr. Coombs, Major Fein,
17 I believe the rest of the government team as well as Major Hurley
18 were on the record. Major Hurley got on a little bit late, but you
19 didn't miss much. The defense requested clarification. The Court
20 advised the government that the Court intended to do an *ex parte*
21 session that would be recorded by a court reporter. With reference
22 to the WikiLeaks issue, the Court asked the defense what they
23 intended to ask the State Department witnesses and the defense

1 advised that they basically wanted to ask the chiefs of mission to
2 review--excuse me, ask if the chiefs of mission had reviewed
3 material, did they provide assessments in writing, part of damage
4 assessments, if not, where is it? And, their questions were based
5 off of Ambassador Kennedy's November 2010 testimony. Was there a
6 working group for WikiLeaks; who composed it; and what statements
7 were given to Congress?

8 All right. The government had advised the Court that it
9 had not reviewed certain Department of State documents for *Brady*,
10 they are still accumulating them. The defense asked why the
11 government hadn't looked at them yet. The government argued that
12 mitigation is not relevant. And, the defense advised the Court that
13 they are going to file supplemental filings. The Court ordered the
14 government to have the Department of State witnesses available. And
15 the government will advise the Court what evidence it will use for
16 aggravation in sentencing and where it comes from.

17 Does either side desire to supplement what occurred at that
18 telephonic R.C.M. 802 conference understanding we're going to get to
19 the filings that have been filed?

20 CDC[MR.COOMBS]: No, Your Honor, the defense will discuss the
21 issue more fully when we argue our motion.

22 TC[MAJ FEIN]: Just two points of clarification, Your Honor.
23 The testimony of Ambassador Kennedy was on March 10th, 2011, based

1 off the email the defense emailed to the Court in March of this year.
2 And, also, Your Honor, the government does not recollect making an
3 assertion that mitigation is not relevant during that conference.

4 MJ: All right. R.C.M. 802 conferences are conferences where
5 the parties raise issues with the Court--to bring, basically, to the
6 Court's attention. Based on the last R.C.M. 802 conference, the
7 defense has filed a motion to record R.C.M. 802 conferences. That
8 has been marked as "Defense Motion to Record and Transcribe All
9 R.C.M. 802 Conferences." That's been marked as Appellate Exhibit
10 121. That motion is not part of the motions that were to be
11 considered today in that R.C.M. 802 conferences, as obviously
12 provided by Rule for Courts-Martial, are routine in criminal trials.
13 The Court believes that it's appropriate to address that motion at
14 this hearing as they may continue to--we may continue to have them
15 and the defense has objected to participating in R.C.M. 802
16 conferences if they're not transcribed. Would you like to add
17 anything for the record?

18 CDC[MR.COOMBS]: Yes, Your Honor. Your Honor, the defense's
19 main position is that, even though we recognize that 802 conferences
20 are, in fact, a very common occurrence within court-martials, usually
21 the 802 conferences are limited to just scheduling issues, advising
22 the Court of what may come up in future motions hearings or any sort
23 of logistical problems that either side may be having.

1 Unfortunately, in this case, the 802 conferences have become an
2 opportunity for the government to re-litigate a lot of the Court's
3 rulings and so what happens is we go into a great deal of substantive
4 matters that the Court then considers from both sides and, even
5 though the Court, correctly, does not make a ruling, we end up
6 discussing the matter in such detail that when we come back on the
7 record, what happens is there is a very brief summary and the Court
8 gives the parties an opportunity to provide more detail, but then the
9 Court makes its ruling. The defense believes that because of the way
10 in which the 802 conferences are being used, both as a matter of re-
11 litigating issues, but also even just right now, the Court recalls
12 from the 802 conference that the government said, "mitigation
13 evidence would not be relevant," that's also the defense's
14 recollection of the government's assertion. But, normally what
15 happens is the government takes a position in the 802 conference and
16 then later, either through its motion or oral argument takes a
17 contrary position. Because of the fact that these are not recorded,
18 the defense is not in a position to say that might be--government's
19 belief is inaccurate based upon its statements. So, for the purposes
20 of a substantive discussion, we would request that the 802
21 conferences be recorded, understanding, though, that the way our
22 system works, if there is a last-minute, like, logistical issue and
23 we need to get parties on the line for logistical stuff, that's

1 normal, that's understandable; the defense will participate in those.
2 Even this morning, the 802 conference, that was perfectly acceptable.
3 But to the extent that we start talking about substantive matters,
4 we'd request that those matters are, in fact, on the record so there
5 is no doubt as to what one party said. If we are re-litigating
6 something, then there is no doubt as to what has been advanced to the
7 Court and when the Court makes its ruling, it's clear the matters in
8 which the Court considered.

9 MJ: All right. Government?

10 TC[MAJ FEIN]: Your Honor, just briefly, for purposes of the
11 record, both the prosecution and defense have petitioned the Court
12 for--during 802s either over the telephone or even though email on
13 substantive matters--there's no prohibition for substantive matters
14 to be discussed. In fact, 802 clearly contemplates that if both
15 parties agree, it should then--has to, not should--must be put on the
16 record. So, it doesn't necessarily draw a line between substantive
17 and procedural matters. The government contends, Your Honor, that
18 there's nothing that the parties or the Court discussed in an 802
19 that can't be put on the record. Of course, everything can be put on
20 the record and that is an option. However, the purpose of R.C.M.
21 802, according to the rule, is to allow conferences for the parties
22 in order to consider matters to promote fairness and efficiency as an
23 expeditious trial. Having recorded 802s is not going to help the

1 purpose of an 802 which is for an expeditious trial. The government
2 objects to recording 802s and if the issue is litigating substantive
3 matters that don't go in favor of one party, then the parties don't
4 agree, it isn't made part of the record as part of what 802 requires.
5 Thank you, Your Honor.

6 MJ: As I discussed with counsel at this morning's 802, the
7 Court is going to consider this issue at this session because it does
8 impact on the procedure for the remaining duration of this trial and
9 the Court is aptly prepared to rule on it.

10 The ruling of the Court is as follows: The defense moves
11 the Court to order all R.C.M. 802 conferences be recorded and
12 transcribed for the record. The government opposes. After
13 considering the pleadings, evidence presented and argument of
14 counsel, the Court finds and concludes the following:

15 1. The trial schedule developed by the Court and the
16 parties provides for Article 39(a) sessions to be held approximately
17 every 5 to 6 weeks. To date, there have been Article 39(a) sessions
18 held on 23 February, 15 and 16 March, 24 through 26 April, and the
19 current session from 4-6 June 2012.

20 2. R.C.M. 802 provides that, after referral, the military
21 judge may, upon request of either party or *sua sponte*, which means
22 "by myself," order one or more conferences with the parties to
23 consider such matters as will promote a fair and expeditious trial.

1 Conferences need not be made part of the record, but matters agreed
2 upon at a conference shall be included in the record orally or in
3 writing. Failure of a party to object at trial for failure to comply
4 with R.C.M. 802 waives this requirement. No party may be prevented
5 from making any argument, objection, or motion at trial. The
6 discussion to the rule states that the purpose of R.C.M. 802
7 conferences is to inform the military judge of anticipated issues and
8 to expeditiously resolve matters on which the parties can agree, not
9 to litigate or decide contested issues.

10 3. The Court has been holding R.C.M. 802 conferences with
11 counsel during and following the Article 39(a) sessions, and by
12 telephone on 8 February 2012, 28 March 2012, and 30 May 2012. Each
13 of these conferences has been synopsized on the record and the Court
14 has invited the parties to add detail to the Court's synopsis.

15 4. Prior to the current motion, dated 2 June 2012, the
16 defense has not objected to conducting R.C.M. 802 conferences.

17 5. R.C.M. 802 does not require that such conferences be
18 recorded or transcribed. The Court will need to hold such
19 conferences with the parties to address administrative, logistics,
20 and scheduling issues. If either party objects to discussion of an
21 issue at an R.C.M. 802 conference, the conference will be terminated
22 and the issue will be addressed at the next Article 39(a) session.

1 6. The Court notes that the parties have raised
2 substantive issues in the middle of Article 39(a) scheduling periods,
3 that, if not addressed expeditiously, will delay the trial.
4 Therefore, the Court, in conjunction with the parties, will build in
5 an additional Article 39(a) session into the Court calendar. I
6 anticipate it will be about a 1-day session, midway between each
7 scheduled Article 39(a) session to address any such issues that
8 arise. If additional substantive issues arise that require
9 expeditious resolution, the Court will schedule additional ad-hoc
10 Article 39(a) sessions as necessary.

11 Ruling:

12 1. The defense motion to record and transcribe R.C.M. 802
13 conferences is denied.

14 2. R.C.M. 802 conferences will not be held over the
15 objection of a party.

16 3. The Court will schedule an additional Article 39(a)
17 session in between currently scheduled sessions to address, on the
18 record, any additional issues that arise between current scheduled
19 sessions.

20 Anything further on this issue?

21 CDC[MR.COOMBS]: No, Your Honor.

22 TC[MAJ FEIN]: No, Your Honor.

1 MJ: Okay. At this time, why don't we move on to the defense
2 motion to compel discovery 2--the defense has filed an additional
3 motion based on disclosures by the government, I believe, and the
4 telephonic R.C.M. 802 conference that we held on the 30th of May.
5 That was filed on Saturday, June 2nd and was not an envisioned motion
6 that would be considered as part of this session. The government has
7 not had an opportunity to respond to that motion. The Court has
8 advised the defense that I'll let you go ahead and present the issues
9 on the record, today, understanding that I'm not going to make any
10 ruling until I hear from the government's response and this will be
11 an issue that will be ripe for the first ad-hoc Article 39(a) session
12 that we do in 2 or 3 weeks.

13 CDC[MR.COOMBS]: Yes, ma'am, and for the purposes of the
14 argument, if the Court could also pull Appellate Exhibit 119 and 120?
15 119 is the prosecution's notice on ONCIX and 120 is the defense
16 response to the prosecution notice.

17 MJ: I have Appellate Exhibit 119 and Appellate Exhibit 120.

18 CDC[MR.COOMBS]: And, ma'am, for my argument, what I would like
19 to do is--within the compel discovery motion (2), we requested four
20 reliefs. I'd like to address the first and then, to the extent the
21 government would like to respond, allow the government to respond on
22 that, and then move on to the other three.

1 So, as the Court knows, within the Defense Motion to Compel
2 Discover Number Two, we requested four reliefs from the Court.
3 First, the Court should order a full accounting of the government's
4 efforts to comply with its *Brady* obligation. Second, that the Court
5 should order the government to produce, in a timely fashion, all
6 *Brady* materials. Third, that the Court should order the government
7 to produce all materials that would qualify under R.C.M. 701(a)(2) to
8 include providing unredacted copies of those documents that would
9 fall under 701(a)(2). And, finally, fourth, which the Court is in
10 the process of doing now, order the government to produce all
11 aggravation evidence that it intends to introduce.

12 So, I'd like to talk about, first, the compel due diligence
13 request. The argument to have the government to produce all of its
14 materials in a timely fashion. The defense believes that we continue
15 to have very serious discovery problems in this case. What the
16 evidence shows, here, is that the government needs to provide a full
17 accounting of its *Brady* search and its *Brady* obligations. The
18 defense has consistently maintained that the government, through its
19 oral submissions, its written arguments, and its conduct, has
20 illustrated that it does not understand its due diligence
21 requirements under *Brady*. The defense raised this issue in the past
22 as part of our motion to dismiss, discussing, initially, how the
23 government did not even cite 701(a)(6) in its motion. We also raised

1 the issue that the government maintained that 701 and 701(a)(6)
2 didn't apply to classified information. We, additionally, pointed
3 out that the government cited *Cone v. Bell* for its position that
4 *Brady* would not be applicable in sentencing. And then, it maintained
5 that the damage assessments that we've been talking about were not
6 even relevant and then later determined that yes, the damage
7 assessments do, in fact, have *Brady* material. I'd like for the
8 Court, for a moment, to step back and think how we became aware of
9 some of the information that is now the subject of the motion to
10 compel discovery (2). Initially, they--the government stated that
11 all of the damage assessments that we have identified as possibly
12 existing were just alleged damage assessments. That was the
13 terminology that they used and the Court indicated that "alleged"
14 would not be sufficient; it would have to, in fact, determine whether
15 or not the damage assessments existed. The government, then, moved
16 on to indicate that Department of State and ONCIX had not completed a
17 damage assessment. At that point, the defense said we were concerned
18 at how the government was using the term "completed." We felt that
19 they were playing fast and loose with that term and it indicated
20 that, perhaps, there was, in fact, a damage assessment. Then the
21 government indicated that it was unaware of investigative files or
22 forensic results in closely aligned agencies. And, again, the
23 defense raised that the government cannot state that it is simply

1 unaware; it has to go look. And of course, the Court ruled that,
2 "yes", the government would, in fact, be required to go look to
3 determine whether or not these files did, in fact exist. And we look
4 at that background, you see that if defense had not raised an issue
5 with regards to "unaware," raised an issue with regards to "have not
6 completed," or "alleged," and just accepted the government's
7 representations, we would not be litigating any of these issues and
8 would not be aware of many of the damage assessments that we are
9 currently aware of. But, most troubling is, within the last few
10 weeks, we have additional information that shows that the government
11 has not been diligent in its Brady's search. The clearest form of
12 proof of that is the HQDA Memorandum; the Headquarters, Department of
13 the Army memorandum.

14 MJ: Well, where do you have that?

15 CDC[MR.COOMBS]: That's at Attachment A to the defense motion to
16 compel discovery. And if you look at that, ma'am, that memorandum
17 was dated, initially, 29 July 2011. So, we know from that is that
18 the government did not start its *Brady* search within the
19 Headquarters, Department of the Army until almost a--well, actually,
20 over a year after. My client was placed in jail based upon these
21 offenses; they had still not yet started their *Brady* search. The
22 incredible thing from this, though, is that 9 months later, somebody
23 within HQDA realized that nothing had been done on the 29 July

1 request. No action, at all, had been done to secure *Brady*
2 information. And it wasn't the trial counsel, it was somebody up at
3 HQDA who said, "You know, we haven't done anything on this. We need
4 to start this." And that's the memorandum that you see dated 17
5 April 2012. So, as of 17 April 2012, the trial counsel in this case
6 hadn't done anything to secure *Brady* information within the
7 Department of the Army and we found out about this--this memorandum
8 and everything else as a fluke. We weren't even supposed to find out
9 about this, but what happened was when they realized nothing had been
10 done, they immediately sent out these memorandums to the principal
11 officers within the Department of the Army, tasking them to look for
12 this information. And unfortunately, or fortunately for the defense,
13 one of those principal agencies is Trial Defense Services. So, these
14 memorandums landed in the--on the desk of my former co-counsel Major
15 Matthew Kemkes and then he sent it to me and I looked at this and
16 that's when I realized that the trial counsel has not even done a
17 *Brady* search within the Department of the Army. And if they haven't
18 done a *Brady* search within the Department of the Army, how can we
19 have faith they've done a due diligence *Brady* search in any other
20 agency? Clearly we cannot. And, in addition to this, during our
21 last 802 session, the government made a startling admission: they
22 stated that they had not gone to the Department of State to review
23 the chief's-of-mission's review, the WikiLeaks working group review,

1 the mitigation team review, or the Department of State's report to
2 congress on the alleged leaks. And their apparent justification for
3 not doing that was they said we had not given them any notice until
4 Defense Motion to Compel (2). That was the first time they received
5 notice. And they also stated that this information would not be
6 discoverable. The defense was dumbfounded at that response because
7 we know we've filed six pre-referral discovery requests for
8 information from the Department of State. In addition to that, we
9 moved to compound this information at the 32 in front of the
10 investigating officer. This information from the Department of State
11 was the subject of discovery--Motion to Compel Discovery Number One,
12 in front of this court.

13 In addition to that, we've been seeking to depose
14 Ambassador Patrick Kennedy for the last 8 months, trying to just sit
15 down Ambassador Kennedy to talk to him. Roadblock after roadblock in
16 front of the defense in order to do that. And, as the Court knows,
17 we've filed a motion to depose Mr. Patrick Kennedy. At that point,
18 the government indicated that it would do everything they could in
19 order to provide him to the defense, but we just needed to submit a
20 Touhy Request and that's what we did. As the Court knows, on 23
21 March 2012, we did submit a *Touhy* request and that *Touhy* request
22 listed, specifically, these groups that we're talking about. Saying,
23 "That's what we wanted to talk about with Ambassador Kennedy." In

1 addition to that, as the Court knows, we supply, both to the Court
2 and to the government, Mr. Kennedy's declaration in front of Congress
3 talking about these subgroups. So, it's entirely disingenuous for
4 the government to say that they had no notice of this information
5 until our Motion to Compel Discovery Number Two, filed on 10 May.
6 They clearly knew and the very latest that they could possibly say
7 that they became aware of this is when Ambassador Kennedy testified
8 to this information in March of 2011. The Department of State is a
9 closely aligned agency. The government has a due diligence
10 obligation to go search their documents and do so in good faith.
11 They cannot simply bury their head in the sand and say this stuff
12 does not exist or "You haven't given us sufficient notification for
13 we need to look for." They were on notice and they have an
14 independent obligation.

15 Now, if the Headquarters, Department of the Army issue was
16 not enough and the Department of State revelation was not enough, we
17 now know from a recent filing of the government on 31 May, that they
18 are currently aware that the FBI does, in fact, have an impact
19 statement and they state that they just discovered that the FBI had
20 this impact statement. The defense has been asking since the very
21 beginning of this case in 2010 for information from the joint
22 investigation done by the FBI. The fact that they could say, at this
23 point and at this juncture, that they're just now finding out that

1 the FBI has done an impact statement, why hasn't the government found
2 out about this before? Where was this impact statement? This is an
3 agency that has participated in an ongoing joint investigation with
4 the Department of the Army. You would think that they would know
5 what the FBI has. And here they are now just saying that the FBI has
6 this impact statement? And take a look at how the government chooses
7 to give the defense and the Court notice of this impact statement.
8 They do so in one sentence referenced on page four of its seven-page
9 response to our supplement to discovery number two motion. And one
10 little sentence, a throw-away sentence within their response, they
11 indicate, "Oh, by the way, the FBI does have an impact statement."
12 That looks like they're just hoping to bury that information; that no
13 one would notice that somehow. That latest revelation shows that the
14 government really just keeps the defense and the Court in the dark
15 about this information until it chooses, on its own accord, to give
16 information to the defense and to the Court. Not only that, within
17 that they indicate that they're going to make this information--this
18 impact statement from the FBI--available to the defense based upon
19 the Court calendar which, when you look at the Court's calendar for
20 the 505 proceedings, it's clear that the government does not envision
21 the defense getting this information anytime soon; this impact
22 statement. So that's obviously problematic.

1 But, as if this 11th-hour revelation about the FBI impact
2 statement was not enough, we now know that ONCIX has a damage
3 assessment. In its response to discovery number one, the government
4 represented ONCIX did not complete a damage assessment. And if you
5 recall, they used that same terminology: "Have not completed a
6 damage assessment with regards to the Department of State." And this
7 court said that that was not enough. "You had to provide greater
8 clarification." So, this court asked the government specific
9 questions regarding the Department of State and regarding ONCIX.
10 And, subsequently, when you gave that request for specific
11 information to the government, the government replied, with regards
12 to the Department of State, the Department of State had not completed
13 a damage assessment. With regard to ONCIX, the government replied,
14 "ONCIX has not produced any final or interim draft assessment in this
15 matter." That's what the government represented to the Court and to
16 the defense and they made that representation to the Court on 21
17 March 2012. Then, as you know, the Court ordered the production of a
18 Department of State damage assessment for an *in camera* review.
19 However, the Court did not, on 23 March, address the ONCIX damage
20 assessment. And this wasn't an omission on the Court's part, this
21 wasn't an oversight on the Court's part. The Court didn't address
22 the ONCIX damage assessment because you hadn't been told about the
23 ONCIX damage assessment. You had been told that they had produced no

1 interim or final report; that's what you were told on 21 March. So
2 then, on 23 March, when you issue your ruling that the department of
3 state damage assessment, the draft damage assessment is, in fact,
4 discoverable, at that point, the government had an obligation to come
5 forward to the Court and say, "You know what, ONCIX also has
6 something." But they didn't' do that; they sat on that information.
7 And then, what happens is, instead of us being able to challenge
8 them--because we couldn't challenge them on the ONCIX. All we had,
9 at that point was a belief that ONCIX had something. But, as the
10 Court knows in, basically, the late--latter part of March, early part
11 of April, we start receiving *Brady* from these other 63 agencies, what
12 the defense calls our 12 pages of *Brady*. And we receive these 12
13 pages and these 12 pages clearly indicated that ONCIX had a damage
14 assessment. Because, within the 12 pages, you see the agency
15 responding to ONCIX, and not only ONCIX, but ODNI which we still
16 haven't heard yet if ODNI has a damage assessment. But they're
17 responding to both ONCIX and ODNI and ONCIX is tasking these agencies
18 to take a look at specific information to assess whether or not this
19 information has caused damage to their agency; if it has, to detail
20 the steps that they've taken in mitigation to address that damage and
21 then to indicate the cost of the steps that they've taken in response
22 to that damage. And when we receive 12 pages of discovery, as the
23 Court knows, we raise that issue with the Court and the government

1 saying, "How can the government maintain that ONCIX does not have a
2 damage assessment when we're looking clearly at these documents that
3 say ONCIX is tasking these agencies with suspense states?" To look at
4 this information, get back to us with this information. Clearly,
5 ONCIX has something. And, at that point, the government chose to
6 define its way out of this inconsistency. The government then said,
7 "You know, wait a second. There's a difference between damage
8 assessment and investigation and what the defense is asking for or
9 what ONCIX may have is more like an akin to working papers." And so,
10 the government, went so far as to provide the Court with a three-page
11 memorandum detailing the difference between what is a damage
12 assessment, based upon their arbitrary definition, what is an
13 investigation, based upon their arbitrary definition, and the fact
14 that the defense really needed to ask for working papers. So, based
15 upon that, the defense said, "We're going to file a motion to compel
16 discovery (2) referencing ONCIX. And we're going to ask for
17 everything--damage assessment, investigation--and we'll even throw in
18 the terminology 'working paper' so the government knows exactly what
19 we're asking for: what's responsive to these 12 pages of *Brady*
20 discovery that we've been given." And, when we did that, at that
21 point, what does the government say? The government says, "Oh, now
22 we don't understand what you're asking for; it's too broad." But
23 when we asked for this information, the government knew and knows

1 that ONCIX has something. They had an obligation at that point to
2 come forward and say, "You know what, ma'am, ONCIX does, in fact,
3 have a working paper, draft assessment that's ongoing that the Court
4 may want to be aware of." But they didn't do anything. They sat on
5 the information. It wasn't until 31 May that the government notified
6 the Court and the defense that ONCIX actually had a damage
7 assessment. And how does the government do that? Take a look at
8 their notification. They justified sitting on this information
9 because they had asked the Court to reconsider its ruling on the
10 Department of State damage assessment. And they said to the Court
11 that draft damage assessments were not discoverable for purposes of
12 *Brady*; that was their position. They filed their position based upon
13 one case, a 1963 Supreme Court case, citing the second concurring
14 opinion, a throw-away sentence within that second concurring opinion,
15 and the government, then, when they filed that, the Court didn't even
16 request that the defense needed to file a reply to it. That was the-
17 -how much their opinion--or at least how much their request had as
18 far as controlling law backing it up. The Court said, "No need to
19 file a response," and, on 11 May, the Court reiterated its 23 March
20 ruling that draft damage assessments by the Department of State were
21 discoverable. At the time the Court did that on 11 May, again,
22 knowing what the Court asked for on 21 March for information, knowing
23 what the Court ruled on 23 March and now, on 11 May, the government

1 had an obligation to come forward to the Court and say, "Your Honor,
2 ONCIX has something." But they sat on the information again for
3 three weeks. And what do they do during that 3-week time period?
4 You see from their 31 March notification--or, excuse me, 31 May
5 notification--that they go to ONCIX and they start coordinating with
6 ONCIX about their draft damage assessment. And they, unilaterally
7 decided that "we're going to be turning your draft damage assessment
8 over on 3 August." And they present this whole thing to the Court as
9 if it's a done deal; no need to coordinate with the Court or the
10 defense. "We've already decided that this damage assessment is going
11 to be turned over on 3 August." Some--at this point, a little over a
12 month before trial, that's when they envision handing this
13 information over. And take a look at the 24 May 2012 memorandum
14 written by Major Fein to the general counsel. It states that on 23
15 March 2012, the Court ruled that the Department of State's draft
16 damage assessment was discoverable and did not rule on ONCIX's draft.
17 That's his wording in his motion to ONCIX's general counsel. The
18 reason the Court didn't rule on ONCIX's draft is because you didn't
19 know about ONCIX's draft. How are you going to issue a ruling if you
20 don't know about the fact that ONCIX has a draft damage assessment?

21 Then, Major Fein makes this simply look like an error on
22 the Court's part stating that the prosecution must notify the Court
23 of this apparent inconsistency in the Court's order. There is no

1 inconsistency in the Court's order. Again, the Court was not aware
2 of the fact that ONCIX had anything. And then--you were not aware of
3 that because on 21 March 2012, the Court--the government represented
4 to the Court and to the defense that ONCIX did not have any interim
5 or final draft damage assessment; that they represented to this
6 court.

7 Now, the defense predicts that, much like what they did
8 when we raised the 12 pages of *Brady*, that the government, again, is
9 going to try to define its way out of this. And, somehow, the ONCIX
10 damage assessment that we now know of was somehow pre-interim; it
11 wasn't really an interim draft damage assessment or maybe it was a
12 pre-working paper, which of course has to be different than a damage
13 assessment which, of course, is different than an investigation,
14 which may or may not qualify as a draft. That is going to be the
15 government's position. But what's clear here is everyone knew what
16 the Court was asking: "Does ONCIX have something?" And they had an
17 obligation at that time to tell the Court "yes," and if they would
18 have done that, the Court would've said, "Turn it over." And you
19 would have looked at it at the same time looked the Department of
20 State's draft damage assessment and then you would've made your
21 ruling. At this point, that would've been the case, we would have
22 had ONCIX's draft damage assessment if the Court determines, much
23 like with the Department of State, that it was discoverable. But

1 now, we're going to have to wait, if the government has its way,
2 until at least 3 August to even to start to address this issue.

3 MJ: Well, Mr. Coombs, the agency, itself, says their
4 coordinated version is not going to be available until July 13th,
5 isn't that correct?

6 CDC[MR.COOMBS]: That is correct. You take a look at that, July
7 13th is when they're going to basically put this kind of in the final
8 format; they had something, though.

9 MJ: Well, I understand your point----

10 CDC[MR.COOMBS]: Yes.

11 MJ: ----but--the timing here--you know, do I want to review
12 short thing--things that aren't together or things that are together?

13 CDC[MR.COOMBS]: Right. But when you take a look at that,
14 ma'am, also take a look at the 12 pages of *Brady*. When did ONCIX
15 start asking for this information? You'll see they asked for this
16 information at the end of 2010, beginning of 2011--that's--and
17 they're putting suspense dates for--in early 2011 for all of this
18 information. So, it appears that the July 13th deadline may be their
19 final report, but they certainly have a draft that the Court should
20 have had the benefit of.

21 So now looking at these latest revelations, now you have to
22 take a look at what the government is doing with regards to the 63 or
23 so agencies that they've indicated that they are reaching out to. If

1 you look at that, the government admits that they initially started
2 reaching out to these agencies in the April/May 2011 time period.
3 Again, over a year after my client has now been in pretrial
4 confinement. What are they doing during that time period? Clearly
5 they're perfecting their case. They're not doing a *Brady* search.

6 And then when you take a look at between April 2011 and
7 February of 2012--and this is where it would be important if we had
8 this as a recoded 802 session. But, in February of 2012, the
9 government represented both to the Court and to the defense--they
10 looked at us in the eyes and they said to us, "We've looked high and
11 low for *Brady*, from April 2011 to February 2012, we've looked for
12 *Brady*, we have found nothing. We have no *Brady*." If the Court
13 recalls, based upon their representation by the government, the
14 defense started saying, "Well, if you really looked and you haven't
15 found anything, well, we may do a waiver of your due diligence *Brady*
16 search if you represent through an accounting of what you've done in
17 order to get this case going forward then. If you say you've looked
18 everywhere, because at that point they were saying they were looking
19 at the Department of Agriculture for stuff. And we were saying,
20 well, we don't think the Department of Agriculture is going to have
21 much, so if that's what we're really holding up this whole process
22 for, let's see what you've done and then we will go forward from
23 there. But, again, the key aspect here was in February 2012, in the

1 802 session, they said to you, "We've found no *Brady*." Then,
2 strangely, shortly after our compel motion discovery number one
3 argument, and the Court's 23 March ruling with regards to the fact
4 that--you know what? 701 does, in fact, apply to classified
5 information. You start seeing that the government is going back to
6 these same agencies, sending requests to these agencies to then
7 produce information to them. Look at the 12 pages of *Brady* and look
8 at the other attachment to our compel motion (2) and look at the
9 dates in which the government is reaching out to these agencies in
10 order for them to produce the information that they gave to ONCIX and
11 ODNI; it's within the last two months. How is it that the government
12 is, within the last two months, now, reaching out to these same 63
13 agencies that they represented to the Court and the defense, in
14 February of 2012, that they hadn't found anything? They've been
15 looking for two years, why are they going back doing a re-look at
16 this point? And the defense would submit that they're doing a re-
17 look because they didn't understand *Brady* the first time around. And
18 they're basically doing a re-search for *Brady* under the proper
19 standard, now. And that's why, even though in February in 2012, at
20 the 802, there was no *Brady* to be found anywhere, now we're getting
21 *Brady*. We're getting *Brady* information in drips and drabs, slowly
22 but surely, but we're getting it.

1 And that brings up the other problem with how the
2 government is doing its due diligence search in this regard. They--
3 instead of going to ONCIX and ODNI directly, to the source that's
4 collected all this information, they're independently recreating the
5 wheel trying to go back to the 63 agencies. And all they're really
6 doing with those 63 agencies as saying, "Send us what you sent to
7 ONCIX and ODNI." Wouldn't it make much more sense to go to ONCIX and
8 ODNI and just get the information? Now, whether or not they can turn
9 that information over and they still have to coordinate with the
10 various agencies, that's a separate equation. I mean, they certainly
11 can, at that point, know exactly which agencies have responded to
12 ODNI and ONCIX and then it makes it much easier than to go to the
13 agencies saying, "Hey, we have this, you gave it to ONCIX, do you
14 have anything else?" But, instead, they're doing it piece-meal.
15 And, at this point, we've received less than half of--I guess, if 63
16 is the number, less than half of the 63 agencies we've received. And
17 again----

18 MJ: So, let me just--you're getting Brady from about 30
19 agencies at this point? Is that what I'm----

20 CDC[MR.COOMBS]: 28, ma'am.

21 MJ: Okay.

22 CDC[MR.COOMBS]: And most of this is like one page, two pages,
23 responses to ONCIX or--excuse ODNI and it basically says, "No

1 damage. No impact." Or, "Possible impact, but on another agency."
2 That's the general gist of what we were receiving. So, if the
3 government is doing this in a diligent fashion, the defense would
4 submit that they would go to record to the source, again, either
5 ONCIX or ODNI.

6 So, now, we see that the government is basically re-doing
7 its *Brady* search. There was another problem that we have and that is
8 that the government continues to seem to not understand what *Brady* is
9 and what their obligations are under *Brady*. And for that, I'd like
10 to look at three specific requests and it's detailed in our motion to
11 compel discovery number two. Requests that we submitted to the
12 Interagency Committee Review, the President's Intelligence Advisory
13 Board, and the House Of Representatives Oversight Committee. The
14 government, apparently, believes that our requests to each of these--
15 for information from each of these three agencies is not specific
16 enough to trigger their *Williams* requirement under *Brady*. And, if
17 the Court will indulge me for a moment, I'll read exactly what we
18 asked for and when we asked for it. For the Interagency Committee
19 Review, the defense requested "the results of any investigation or
20 review concerning the alleged leaks in this case by Mr. Russell
21 Travers, the National Security Staff Senior Advisor for information,
22 access, and security policy. Mr. Travers was tasked to lead a
23 comprehensive effort to review the alleged leaks in this case." We

1 started asking for that in December of 2010. Then, with regards to
2 the House of Representatives Oversight Committee----

3 MJ: Well, let me just ask you a question: How do you know on
4 the Interagency Committee that all of this is--that he's tasked?

5 CDC[MR.COOMBS]: Yeah, I mean, that's a great question because
6 this is the only way we actually find out about *Brady* information is
7 that somebody from the government indicates in a public press account
8 or whatnot that this is ongoing. In this case, the Interagency
9 Committee Review--the White House indicated that they had tapped Mr.
10 Russell Travers to head up this review and to look into the impact of
11 the alleged leaks. So, it was a public statement by the White House
12 and, based upon that, that's why we submitted our 8 December 2010
13 request saying, "Hey, we've been now--we're aware of the fact that
14 this is ongoing." So, we asked the government, now, with a specific
15 request under number three with regards to 701(a)(6), to go take a
16 look at that information. And, again, the government is maintaining
17 that the request I just read to you is not specific enough to trigger
18 their *Williams* requirement under *Brady*.

19 With regards to the House of Representatives Oversight
20 Committee, we asked for the results of "any inquiry and testimony
21 taken by the House of Representatives Oversight Committee, led by
22 Representative Darrell Issa." The committee considered the alleged
23 leaks in this case, the actions of Attorney General Eric Holder, and

1 the investigation of PFC Bradley Manning. We asked for this 10
2 January of 2011 and, again, with this, this is based upon public
3 statements of public accounts of the fact that Representative Darrell
4 Issa was, in fact, convening this--these reviews in order to
5 determine what was going on at that point, both with the Department
6 of Justice and in the investigation of my client, so, probably the
7 Department of Defense.

8 MJ: All right. Mr. Coombs, just--I have a question for you.
9 I'm looking at *Williams* and where--it's three, "other files as
10 designated in a defense discovery request which involve a specified
11 type of information within a specified entity and a line will be
12 drawn case-by-case." Where is that line? If you ask for everything
13 from everybody under the sun that ever touched this case, where is
14 the line?

15 CDC[MR.COOMBS]: Oh--no, that's a great question because you're
16 right, you've got to give enough specificity in order for the
17 government to know what you're asking for; that's why I read these
18 two requests. These are--at least to the defense--in the defense's
19 mind, these are very specific. They name an individual, they name a
20 time period, they name what was happening. It has to be something
21 that would require--then the government, from its good faith due
22 diligence requirement, to at least go look. And when you take a look
23 at the third request which the government does say is sufficient,

1 they--in that, it's the President's Intelligence Advisory Board, we
2 ask for any report or recommendation concerning the alleged leaks in
3 this case by Chairman Chuck Hagel or any other member of the
4 Intelligence Advisory Board. And the defense, for whatever--I mean,
5 in any stretch of imagination, cannot understand how that request is
6 specific enough to trigger the *Williams* requirement, but the other
7 two requests are not. I mean, really, short of telling the
8 government that it's in a red file within the Darrell Issa's third
9 drawer beneath his Bible, you'll find what we want. You can't get
10 much more specific than what we've asked for. The government is, at
11 that point, on notice of what we're asking for and they have a good
12 faith obligation to go look. The defense recognizes that the
13 *Williams* requirement is not so vague that we can just simply say,
14 "Give me any file at any agency that, at any point, had addressed
15 this case." I mean, that would be too vague. But these are specific
16 requests. And the government comes back saying, "We've provided no
17 authority to suggest that these specific requests and that we've
18 asked for fall under *Williams* or 701(a)(6). The problem with that is
19 we're asking, here, for these records and the government comes back
20 to us saying that, again, the defense has not provided a sufficient
21 request for *Brady* and they go back to whether or not these records
22 are alleged records, the defense believes the government, again, is
23 just simply playing "hide the ball." These are not alleged records,

1 these are records that we have given them sufficient specificity to
2 trigger their good faith obligation to go look. And, more
3 importantly, there is no other requirement above and beyond giving
4 the specificity within section three, the detail to the government
5 why this information may, in fact, be *Brady*. But to the extent that
6 someone might read that in, the very nature of what was going on in
7 these various agencies, it's clear that *Brady* material may exist
8 there and that's the whole purpose of triggering the good-faith
9 requirement of the government to go look. And yet the government is
10 just simply saying "no." They are content in not looking--at least--
11 apparently--intent in not looking in every agency besides the
12 President's Intelligence Advisory Board which that, apparently, was
13 specific enough for them.

14 If the government, in this case, is, in fact, conducting a
15 due diligent *Brady* search, they should have nothing to hide to this
16 court or to the defense. They should be able to clearly lay out what
17 they've done since the start of this case in order to comply with its
18 requirements under 701(a)(6). What the defense is asking is that
19 this court require the government to do so. What we would ask is the
20 Court suspend the hearing for 2 to 3 weeks in order--at the maximum--
21 in order for the government to put this information together unless
22 they can do it quicker than that.

1 MJ: Let me ask you a question on that. I understand--again,
2 I'm not making any rulings until I hear the government's position
3 which they haven't had the chance to respond yet--but why would
4 proceedings have to be suspended--assuming I went completely in your
5 favor, why can't the proceedings drive on as scheduled and this be
6 done ancillary?

7 CDC[MR.COOMBS]: Yeah, the problem is when we take a look at
8 what's on the case calendar. On 22 June, we have to give you--the
9 Court and the government notice of our intended witnesses at trial.

10 MJ: No, I understand things might have to be moved, but
11 instructions----

12 CDC[MR.COOMBS]: Well, ma'am, I guess---with regards to that, if
13 there are other issues that will impact the preparation for trial
14 such as, what are the instructions for the charged offenses that are
15 remaining, we have a----

16 MJ: Request--Article 13----

17 CDC[MR.COOMBS]: Exactly, an Article 13 motion. Things that
18 don't impact case preparation, then we certainly could still address
19 those. The defense, however, believes that, with regards to the
20 witness list notification, the 505(h)(1) notification, notification
21 of what evidence that we intend to introduce, the reciprocal
22 discovery requirements, all of that information cannot be done until
23 the government complies with its initial discovery obligations in

1 this case. And so, what we're asking is that the Court give the
2 government, at a maximum 2 to 3 weeks to respond to the questions we
3 raised within our motion and those are: what specific agencies has
4 the government contacted to conduct its *Brady* Review? When did the
5 government make its inquiry? How many documents did the government
6 review?

7 MJ: How is that relevant?

8 CDC[MR.COOMBS]: It's relevant, ma'am, because of the fact that,
9 if the government is saying, for example--let's go with ONCIX--it's
10 *Brady* review--they tell the Court that it reviewed only 15 pages of
11 documents, we know, then, they haven't done a due diligent search
12 within ONCIX. We have a problem there because ONCIX has tasked all
13 these agencies to respond back to them. So, just having the
14 government indicate how many pages do they review from whatever
15 agency and then what were the results of their review. That should
16 not be an onerous task on the part of the government. *Brady*, in this
17 case, is a constitutional mandate; it's right of the accused in order
18 to have this information and the timing of this is as soon as
19 practical. That's when this information needs to be provided to the
20 defense so that we can, in fact, incorporate it into our case because
21 it could address issues of guilt and, obviously, issues of
22 punishment. But the defense can't do that if we're receiving it
23 piece-meal or if the government is not at all complying with its

1 Brady obligations. Once we have a complete account of what the
2 government has done, then that goes to the second request of the
3 defense to order a timely production of this Brady information and
4 not in this piece-meal fashion that we're receiving now but get the
5 information together and turn it over so that we can, at that point,
6 start to incorporate it where we have all the information at once.
7 And the defense's position would be: once we have all of the Brady
8 discovery and then we'll argue for the motion to compel (2), being
9 701(a)(2) discovery. Then the defense would need at least 2 months
10 to incorporate that information into its case-in-chief and into its
11 sentencing case. And when you look at the timing that the defense is
12 asking for, we have to remember that the government has had access to
13 this information and these other agencies for over 2 years. When the
14 Court takes a look at what the government has in its aggravation
15 case, it will be clear what the government has done as far as
16 coordinating with other agencies--which agencies they've reached out
17 to and used information from. The government's been using this time
18 to perfect its case, all the while keeping the defense in the dark
19 with regards to needed discovery for us to perfect our case. So, two
20 months of additional time after they fully comply with discovery and
21 we have no more discovery issues is, at a bare minimum, the time
22 period the defense would need in order to incorporate this
23 information.

1 Now, at this point, I'd like to let the government respond
2 to the due diligence request and then I'd move on to my other three
3 requests.

4 MJ: All right. Well, before we do that, government hasn't had
5 a chance to respond to that, at least in writing, because you filed
6 it on Saturday, the 4th of June which was last Saturday.

7 CDC[MR.COOMBS]: Yes, ma'am.

8 MJ: One thing I would ask you to do--as I said, we're going to
9 address this in the interim Article 39(a) session that we're going to
10 schedule--if you would, incorporating--understanding you don't know,
11 but incorporating your best guess as to the time flow, should I go in
12 your favor, what you're anticipating the Court calendar is going to
13 look like.

14 CDC[MR.COOMBS]: Yes, ma'am. I think we could almost--not even
15 just do a best guess--we said 2 to 3 weeks from this point for them
16 to do the due diligence, and then whatever the Court thought was a
17 reasonable amount of time for them to fully comply with the discovery
18 and turn it over, whatever date the Court sets from there, 60 days
19 after that start a trial, defense would be fine with that.

20 MJ: Well, you remember you have to get yours together, you have
21 the classification information, notices, all of that needs to play
22 out.

1 CDC[MR.COOMBS]: Yeah, and then that will actually go back and
2 that's part of the argument for what we raised with the motion to
3 compel (2) as well that, if the government was thinking through this
4 piece, they would have--like if they were really just waiting for the
5 judge to control 505 discovery, they would have been ready at that
6 time to tell the judge exactly what information an OCA is going to
7 ask for a privilege under 505(c) and we'd have a 505(i) hearing, what
8 information that an OCA is going to ask a redacted version under
9 505(g)(2) or some substitution. They weren't ready to do that, but
10 this information, here, this should be something that the government
11 is realizing like, "Look, here's *Brady*, here's information like the
12 ONCIX and everything else. This is information that we know we're
13 going to have to either, turn over because it's *Brady*, or we're going
14 to have to request for a substitution." So, this is stuff they
15 should have been coordinating in advance. It shouldn't be hanging up
16 our trial calendar, but it is and that's because they haven't done
17 that and that's the problem on the government. Now, actually, we'll
18 go to, probably, the Article 10 motion with regards to their
19 diligence. But, in this instance, whatever the date is--if the
20 government says, "Hey, we need x amount of days to coordinate the
21 ONCIX, say, *Brady* redactions and substitutions," well, unfortunately,
22 at this point, we have to build that in because we are, I guess,
23 beholden to whatever the OCA determines they're going to turn over.

1 But that makes--that, I think, underscores the discovery violations
2 and problems in this case because the government should know that
3 they have to do this. But, really, they didn't think that 701(a)(6)
4 applied to classified information. We know that as a fact from their
5 filings. So, that explains why, after 23 March when this court made
6 its ruling, the government has been scrambling ever since.

7 MJ: All right. I'm looking at the time, Major Fine, would you
8 like to reserve replying or do you have any reply that you want to
9 address the Court with at this time? Or both?

10 TC[MAJ FEIN]: Alternate proposal, Your Honor: looking at the
11 time, we would like to reserve our reply to the diligence argument
12 since we did just receive it this past weekend. However, for the
13 NCIX portion, I think--I know we can argue that today, Your Honor.
14 So, if we could----

15 MJ: Well, that stems back from the defense motions to compel
16 (1) and (2), so I----

17 TC[MAJ FEIN]: Right, Your Honor.

18 MJ: ----would like to address that today.

19 TC[MAJ FEIN]: Say again?

20 MJ: I would like to address that today.

21 TC[MAJ FEIN]: Yes, ma'am. What the government is going to ask
22 for, since it is 1210, if we could possibly go on a lunch recess
23 right now and, during that time, we'll have time to finalize the

1 government's position for the NCIX filing or the "response" as the
2 defense called it this--that we received this week.

3 MJ: All right. How long--it's, I noticed, 10 minutes after 12.
4 How long would you like for lunch? 1300? 1330?

5 TC[MAJ FEIN]: Can we do 1330, Your Honor?

6 CDC[MR.COOMBS]: No objection, Your Honor.

7 MJ: All right. Notice we have something scheduled later in the
8 day, I believe, at 1500.

9 TC[MAJ FEIN]: Ma'am, starting at 1500, but we can move it to
10 later.

11 MJ: That can move?

12 TC[MAJ FEIN]: Yes, ma'am.

13 MJ: All right. In that case, court will be in recess until
14 1330.

15 **[The Article 39(a) session recessed at 1210, 6 June 2012.]**

16 **[The Article 39(a) session was called to order at 1335, 16 June**
17 **2012.]**

18 MJ: Major Fein, I believe, all parties present when the Court
19 last recessed are again present in court. Major Fein, I believe when
20 we last recessed the government was preparing to respond.

21 TC[MAJ FEIN]: Yes, Your Honor. Well, the government is
22 prepared to respond. I don't--if it pleases the Court, if we go down
23 the discovery list, we get to the NCIX, we can respond then or we can

1 respond immediately based upon how the Court sees proceeding this
2 motion.

3 MJ: Okay. I believe the defense had just finished with the due
4 diligence piece as well as the ONCIX portion. I do plan to go entity
5 by entity with both sides. Do--does either side desire to begin with
6 the compel discovery with any general oral argument or do you want to
7 rely on your brief?

8 CDC[MR.COOMBS]: The defense would like to begin oral argument,
9 ma'am, so if the government doesn't want to respond right now to the
10 ONCIX piece--the--that aspect of the due diligence, then we would
11 proceed with our argument?

12 MJ: What would you prefer to do?

13 TC[MAJ FEIN]: Ma'am, as it applies in ONCIX, we will respond as
14 it gets to that portion of the motion to compel the original motion.

15 MJ: All right.

16 TC[MAJ FEIN]: Assuming that it will come up.

17 MJ: Okay. Why don't we go ahead and begin, then? Before we do
18 that, to have the relevant appellate exhibits?

19 CDC[MR.COOMBS]: Ma'am, you should have, with regards to this
20 motion, Appellate Exhibits 96, 98, 99, and 101 as far as the defense
21 filings.

22 MJ: All right.

1 CDC[MR.COOMBS]: Again, ma'am, the defense requested not only
2 due diligence obligation by the government as far as doing an
3 accounting, but, secondly, we ask that this court order immediate
4 production of the *Brady* discovery. When you look at 701(a)(6), the
5 rule clearly indicates that this information needs to be turned over
6 as soon as practicable. 2 years into the case and we're still asking
7 for this information hardly qualifies as "as soon as practicable."
8 And, again, looking at some of the agencies that we've asked for--and
9 I know the Court plans to go through these agency by agency, but just
10 taking a look at the *Brady* that we've been specifically requesting
11 for and the government has not, either provided the *Brady* or not
12 responded in an adequate way.

13 With regards to the Interagency Committee Review and the
14 President's Intelligence Advisory Board and the House of
15 Representatives Oversight Committee, taking them in order, with
16 respect to the Interagency Committee Review, the government states
17 that the defense failed to provide any basis for its request. Now,
18 again, the authority that I think the government is looking for in
19 this case is *Brady*. With regards to the President's Intelligence
20 Advisory Board, and the Court looks at footnote four of the
21 government's brief, compare, the government states that the
22 prosecution is in the process of searching for discoverable
23 information from the Intelligence Advisory Board. Why is the

1 government just in the process of searching for this information? We
2 asked for this information over 7 months ago and the government now
3 is stating that they are just in the process of doing this. We're
4 just months before trial and they haven't even, apparently, completed
5 this aspect.

6 With respect to the House Of Representatives Oversight
7 Committee, the government maintains that--two things. One, it has no
8 knowledge of such records and, second, that the defense has not
9 stated an adequate basis for its request. Well, again, the basis
10 that the government is looking for is called *Brady*. And with regards
11 to the adequate--no knowledge of the records, the Court has already
12 said that is not an adequate response; you have to indicate that
13 you've at least done a good-faith attempt to go search for those
14 records. So, in this regard, the government's response, again, shows
15 their intent to not provide the *Brady* that the defense has requested.

16 MJ: Mr. Coombs, are any of these entities, and anyway, involved
17 with the prosecution in this case?

18 CDC[MR.COOMBS]: These entities--not in the prosecution, ma'am,
19 no, but when you take a look at what these entities have done, they
20 have taken a look at the leaks in this case and any possible damage
21 that may have happened and what corrective steps were taken. So,
22 the fact that these agencies would possibly have *Brady* is clear just
23 from the call of what the agency is doing. The agency is looking at

1 the alleged leaks and making the determination if any damage was done
2 and, if so, what steps need to be taken. And if not, then, obviously
3 the agency would say no damage was done. That would be classic *Brady*
4 material. And that's why, under the third prong of 702(a)(6), when
5 the defense asks for it by name and gives specificity, that triggers
6 the government's obligation under *Williams* to at least go look and
7 then come back, after exercising a good-faith effort to look,
8 indicate whether or not that information exists. They can't just
9 simply say they have no knowledge and "you haven't stated the correct
10 basis." And when you look at our Motion to Compel Discovery (2), we
11 believe there are huge problems with regards to *Brady* in this case.
12 We still haven't received all of *Brady* from DIA, DISA, CENTCOM,
13 SOUTHCOM, the HQDA memorandum that we pointed out with regards to the
14 due diligence, no *Brady* from that, *Brady* from the Department of
15 State, FBI, Department of Justice, ONCIX, ODNI, DSS, CIA, *Brady* from
16 a--subagencies within the Department of State--the ones we've
17 identified, the WikiLeaks Working Group, the Mitigation Team, the
18 report to Congress, the identity of individuals who might be at risk-
19 ---

20 MJ: Let me stop you there for just a minute. The entire CIA,
21 DIA, DISA, CENTCOM, and SOUTHCOM files relating to PFC Manning,
22 WikiLeaks, or damage to include documents, reports, analysis, files,
23 investigations, letters, working papers, damage assessments?

1 CDC[MR.COOMBS]: Yes, ma'am.

2 MJ: Is it the defense's prostitution that the government has to
3 search every file in DIA, DISA, CENTCOM, and SOUTHCOM?

4 CDC[MR.COOMBS]: With relation to this case, yes, ma'am, because
5 these are agencies the Court has found are within the military's
6 custody, possession and control. So, this would be no different than
7 saying, "I want the entire CID file." It's an agency within the
8 military's possession, custody, and control so they have not only a
9 *Brady* obligation, just in general, but this is a 701(a)(2)
10 obligation, at this point, to hand over records that are material to
11 the preparation of the defense. No court would even question the
12 fact that a CID case file is material to the preparation of the
13 defense. So, again, to the extent that DIA, DISA, CENTCOM or
14 SOUTHCOM have independent case files or files relating to these
15 alleged leaks, then, yes, that would follow right in with a CID case
16 file; material to the preparation of the defense. And we should get
17 the entire file not some sort of redacted version unless, of course,
18 we're talking classified information the Court--the government goes
19 through the proper procedures. *Brady* from the 63 agencies, we've
20 talked about the fact that we've just gotten, now, 28 so far and it's
21 unclear, when you look at the time period in which we received these,
22 it looks like they were done based upon a 2010, or at the very
23 latest, early 2011 request by ONCIX or ODNI and the response is in

1 the same time period, either late 2010 or early 2011. So, it looks
2 to be like a snap-shot as to what effect has it had on your agency up
3 to this point. It's unclear whether or not any of these agencies did
4 a follow-up evaluation because now you're talking almost two years
5 later. So, again, some serious concerns about *Brady* with regards to
6 the timing of the information that we're receiving.

7 So, all these outstanding questions support not only the
8 defense's request for due diligence accounting, but also, once we do
9 have a due diligence accounting, we know exactly what the government
10 has done, what still remains to be done, then a timeline for when the
11 government has to turn this stuff over is the next follow-up step.
12 And I do know that in my motion earlier this morning, I--for the due
13 diligence--I asked the Court to request four questions of the
14 government. Clearly, whatever the Court would deem to be appropriate
15 to find out with regards to "Has the government done its due
16 diligence requirement for *Brady*?" that would be perfectly acceptable
17 with the defense. Basically, what we want is just an accounting of
18 what they've done and if they have nothing to hide, there should be
19 no problem with that. So, whatever the Court believes would be
20 appropriate for the Court to make that determination would be
21 acceptable to the defense.

22 Now, third, the 701(a)(2) information that we've requested.
23 The Court should order documents turned over by the government that

1 falls under 701(a)(2), documents within their possession, custody,
2 and control, and which are material to the preparation of the
3 defense. We had the argument--of course they have to be relevant and
4 I agree with that, ma'am--but something that is within their
5 possession, custody, or control. And when you take a look at this
6 area--before I get into this, I do want to highlight, again, the
7 issue of definitions. The government seems to be their main
8 objection to our 701(a)(2) discovery requests or they simply do not
9 understand what we're asking for. That seems to be their main reply
10 time and time again and we highlight that in our motion. And it
11 appears to be that what they're saying is--when we ask for damage
12 assessments or we ask for investigations, that's not the correct
13 terminology and we've had the whole 802 session to determine what it
14 is the government needed to hear in order to understand what everyone
15 does know what we're looking for and that is any evidence with
16 regards to these alleged leaks and the harm or the lack thereof that
17 might have caused in order for us to prepare for case--or for our
18 trial.

19 Now, the government has said, again, that, with regards to
20 much of this information, that we need to use the term "working
21 papers" and so, we added that terminology. And when we added that
22 terminology in order to allow the government to see what we're
23 looking for--again, any documents, reports, analysis, files,

1 investigation, letters, damage assessments, investigations, working
2 papers--we put all that in and renewed our request for much of this
3 information. And now the government came back and said before it was
4 too narrow and now it's too broad. And it's unclear what information
5 we have to provide to the government for them to understand what
6 we're asking for, but it's basic and we've been asking for this,
7 really, since the very beginning. If the Court recalls, our very
8 first 802 session, even before the arraignment, we did a telephonic
9 802 and the defense alerted the Court that we would be filing certain
10 motions right at the very first motions hearing. We'd be asking for
11 certain things and we told the Court, "We've been asking for these
12 same things since day one," and here we are now still asking for
13 these same things.

14 So, now, with that background, let's take a look at what
15 are documents within the possession, custody, and control of the
16 trial counsel and what are documents that are not--or at least what
17 they believe are not. Now, 701(a)(2) lays out the requirement, here,
18 and, at least from the documents that we've asked for, I'd like to
19 cover some of the things that there's no dispute that it's within the
20 possession, custody, and control of the trial counsel. The first is
21 the HQDA documents. In this instance, HQDA, of course, is part of
22 the Army. That is clearly within the possession, custody, and
23 control of the trial counsel; there should be no question with

1 regards to that. And it also is self-evident why we're asking for
2 that information. The government states that, first, the defense has
3 not put the prosecution on notice as to what the defense desires with
4 regards to the HQDA. Second, they state that the defense has not
5 provided an adequate basis for why all the information within HQDA is
6 material to the preparation of the defense. Well, taking those in
7 turn because their arguments don't make any sense, the defense
8 desires what the HQDA memorandum was asking for; that's what the
9 defense desires. And with regards to material to the preparation of
10 the defense, let's take a look at what the HQDA memorandum was asking
11 for and that is, again, Attachment A to our motion. That memorandum
12 states, "Any documents or files with material pertaining to any type
13 of investigation, working groups, resources provided to aid in
14 rectifying an alleged compromise of government information, damage
15 assessments of the alleged compromise, or the consideration of any
16 remedial measures in response to the alleged activities of PFC
17 Manning and WikiLeaks; that's what the HQDA memorandum is asking for.
18 It' so, again, self-evident as to why that would be relevant and why
19 that would be material to the preparation of the defense. The
20 government cannot say, "Hey, we don't know what you desire or you
21 need to identify why this information would be material to the
22 preparation of the defense." That's not the onus on the defense. If
23 the government believes that some of that document or documentation

1 is not material to the preparation of the defense, the government
2 goes to the Court and says, "Hey, this stuff is not material to the
3 preparation of the defense." But they don't just simply say, "No,
4 we're not going to give it to you." By opposing discovery, and
5 especially discovery with regards to HQDA, they just simply look like
6 they're trying to hide things instead of doing what their ethical
7 obligations are and that is to produce the documentation.

8 Now, I'd like to move on to documents that the government
9 disputes are within their possession, custody, and control. The
10 government acknowledges that the FBI and DSS participated in a joint
11 investigation and it also acknowledges that the Department of State,
12 Department of Justice, CIA, and ODNI also are closely aligned with
13 the government in this case. The Court has found that ONCIX, in
14 addition to all this, is closely aligned. The government still
15 maintains that ONCIX is not.

16 MJ: All right. You said the Court has found--and I did. Is
17 it the defense's position that they're closely aligned or not?

18 CDC[MR.COOMBS]: Yes. The defense agrees that they are closely
19 aligned.

20 MJ: And what makes them closely aligned?

21 CDC[MR.COOMBS]: Well, in addition to the Court's 23 March
22 ruling----

23 MJ: I know what I ruled, but what----

1 CDC[MR.COOMBS]: That would--I would go as far as citing for my
2 basis--but they're closely aligned in this case because, as you start
3 to look and unravel, the relationships between the various agencies,
4 ONCIX, it's clear, took the lead along with ODNI of contacting all
5 the agencies that might have been impacted by the Department of State
6 releases. And they identified each of the cables that were relevant
7 to that particular agency. And they asked them, "Take a look at the
8 cables, tell us if this caused any damage or any impact on your
9 organization and, if so, how. And if you have had any impact, tell
10 us what you're doing as a remedial step and the costs of those
11 remedial steps. And so that information goes back to ODNI and ONCIX
12 and it's clear that ODNI and ONCIX are leading this based upon
13 probably a Department of State request and the fact that the
14 Department of State is closely aligned with DoD; part of a joint
15 investigation. That's how all these agencies are connected. The
16 defense also believes, when you start to look at the aggravation
17 evidence, you'll see where the government has obtained their
18 information and how those agencies are closely aligned as well.

19 In addition to that, in this instance, ONCIX clearly, like
20 I said, is the repository, really, of what damage may have been
21 caused by these alleged leaks because they're the ones collecting it.
22 So, that information is being shared with the government; again, they
23 are closely aligned.

1 Now, the defense maintains that, when we're requesting
2 discovery from agencies that are either participants in a joint
3 investigation or who are closely aligned with the government, that
4 this would fall under material that's within the possession, custody,
5 and control of the trial counsel under 701(a)(2). Now, we previously
6 argued this in regards to the *Brady*--or, excuse me, the obtaining--
7 the testimony in the grand jury as to what is in the military's
8 possession, custody, and control and what is not. And the
9 government, at that point as well as in this motion, has maintained
10 that the correct analysis for this court is on the term "military
11 authorities." That's the correct analysis for the 701(a)(2), but
12 that's not. The correct analysis is, "What is the possession--what's
13 within the possession, custody, and control?" That's the term that
14 the Court has to look at.

15 MJ: How do you square that with the analysis for R.C.M.
16 701(a)(2)?

17 CDC[MR.COOMBS]: In what respect, ma'am?

18 MJ: It says, "Except for Subsection (e)", the rule deals with
19 discovery in terms of disclosure of matters known to or in the
20 possession of a party, thus the defense is entitled to disclosure of
21 matters known to the trial counsel or in the possession of military
22 authorities. "Except as provided in Subsection (e), the defense is
23 not entitled, under this rule, to disclosure of matters not possessed

1 by military authorities or to have the trial counsel seek out and
2 produce such matters for it. See M.R.E. 706 concerning defense
3 discovery of government information, generally. Subsection E may
4 accord the defense the right to have the government assist the
5 defense in securing the evidence or the information when not to do so
6 would deny the defense similar access that the prosecution would have
7 if it were seeking the evidence or the information." I guess where
8 I'm looking at that is----

9 CDC[MR.COOMBS]: No, I----

10 MJ: ----it seems to be flipping me over to 703.

11 CDC[MR.COOMBS]: I do understand. The--that analysis--when you
12 also compare that with the analysis to 701(a)(2) as to how that rule
13 was patterned after Rule 16, the analysis that the defense would
14 believe that the Court has to go to is, first, Rule 16 and 701(a)(2)
15 are identical in every respect besides Rule 16 uses the word
16 "government." Rule 701(a)(2) is supposed to be more expansive; not
17 only possession of the trial counsel, but also in the possession of
18 military authorities. The analysis that the Court just read applies
19 to possession of military authorities and that's why 701(a)(2) and
20 discovery, in general, in the military is much broader because we say
21 not only what's in the hands of the trial counsel, but now anything
22 that's in the hands of military authorities, you have to turn over.
23 So, that whole analysis is spot-on and the analysis you just read is

1 totally correct with regards to military authorities, but the
2 determination the Court has to make here is "what is in the
3 possession, custody, and control of the trial counsel?" And that is
4 where the defense is saying if the Court looks to Rule 16 and looks
5 to federal precedent in this case because, unfortunately, there is
6 not a lot of military--there is actually none because these issues,
7 usually, are not really litigated. But you have the same issue come
8 up in--the question being, "What is in the hands of the U.S.
9 Attorney?" And federal court after federal court after federal court
10 rules that, "Look, if the U.S. Attorney goes to Agency X and takes
11 advantage of his or her ability to get files and records from that
12 agency and they're part of a joint investigation or they're closely
13 aligned, where they get the benefit of that relationship, that trial-
14 -that U.S. Attorney, then, cannot say that their records are not
15 within "my possession, custody and control." They have to, at that
16 point, and a matter of fairness, say that if the defense is asking
17 for records from that same agency, those records need to be produced.
18 And the Trevino case actually lays this out in kind of plain
19 language, "This simply has to be true." The Trevino case says,
20 "Look, if we would allow the government to do that--partake of
21 working with other agencies that, from a standpoint of just looking
22 at here, clearly, outside of the normal custody, possession, control
23 of that government--U.S. Attorney--if we were to allow them to do

1 that and leave anything that's harmful--anything that would, in fact,
2 have to be produced to the defense--because it's material to the
3 preparation of the defense--leave it with that other agency, then you
4 would be in the situation where a U.S. Attorney would have every
5 desire to involve some other agency in their investigation." The
6 same should be true, here, in the military. If the trial counsel
7 takes advantage of a joint investigation with the FBI, with the DSS,
8 with the Department of State, and the other agencies, Department of
9 Justice--if they take advantage of going to--and that's why it's
10 going to be important to see what aggravation they have. If they
11 take advantage of going to various agencies and cherry-picking the
12 information that's beneficial to their case and then leaving in the
13 repose of those agencies anything that would be material to the
14 preparation of the defense, then you're in the absurd situation where
15 an accused in the federal system would fare better than an accused in
16 the military system because an accused in the federal system could
17 say to his civilian attorney, "Hey, go push the judge, under Rule 16,
18 to give me possession, custody, and control over those records and
19 those other agencies. And time and time again, Rule 16 and the cases
20 we've cited, judges say, "Spot on; that's correct." The government
21 cannot take a benefit of it and then turn a blind eye to your request
22 under Rule 16. In the military, the military accused would now be in
23 a position where he could not, or she could not ask their military

1 counsel or civilian counsel to go say, "Hey, force the judge, under
2 Rule 701(a)(2) to make the government produce those records," because
3 it is within their military possession, custody, and control,
4 couldn't do that and that would fly in the face of just about every
5 case that discusses discovery in the military system. Every case
6 says that an accused in the military enjoys a broader right to
7 discovery than his or her federal or state counterpart. So, that
8 would not be true in this case.

9 MJ: Talk to me about--is there a reasonableness aspect to it?
10 I'm looking at the *Libby* case where I think they wanted the entire
11 CIA briefing book and the judge said, "Well, you get some of it but
12 not all of it."

13 CDC[MR.COOMBS]: Right. No, there certainly is, ma'am. There--
14 and the *Libby* case is a great example where the government said,
15 "Hey, they got the full advantage of getting cooperation with the
16 White House and other agencies in order to get records," and then
17 they tried to say--the U.S. Attorney tried to say, "Hey, this is not
18 in our possession, custody, or control. And the judge said, "No, no,
19 no, no, wait a second. You don't get the benefit of going there and
20 then, now, throw up your hands and say, 'Sorry, it's in some other
21 agency's file cabinet, not ours.'" There certainly is a
22 reasonableness standard and that's why, in this instance, the
23 reasonable step the defense would argue is anything that is dealing

1 directly with either the damage--alleged damage or lack thereof from
2 these leaks, anything dealing with PFC Manning, specifically, and/or
3 anything dealing with any sort of remedial steps that were taken
4 after the step--after this whole process. So--and when you take a
5 look at why we're asking for that, it's clear that that would be
6 material to the preparation of the defense because, just for
7 argument's sake, even though the defense hasn't seen anything to that
8 extent, but say there is something out there that says it was just
9 terrible, end-of-the-world damage because of this, that clearly,
10 then, would influence the steps that the defense may or may not take
11 for their preparation of trial and what they might do. On the
12 opposite side, if all these other agencies looked at it and they
13 said, "No damage whatsoever," then that would have a similar impact
14 as to what we do and the decisions we make. And so that's why this
15 stuff has to be deemed within their possession, custody, or control
16 if, in fact, it is a joint investigation or a closely aligned agency,
17 according to the defense's position.

18 Now, this, again, goes back to--and I--and the Court is
19 correct in saying a lot of this stuff turns on what is the government
20 intending to use in aggravation and that's the next request for
21 relief that the defense is asking--that the Court actually order the
22 government to produce the evidence it intends to offer in its case--
23 in-chief or in sentencing that deals with evidence from these other

1 agencies, either aggravation or an attempt to prove their particular
2 element if they're relying upon some other agency for this
3 information. Because when the Court sees that, then it becomes clear
4 the extent at which the government has had the ability to work with
5 these other agencies to perfect its case. And for argument's sake,
6 let's say there's something from the Department of State that they're
7 relying upon--that they're getting. Well, you shouldn't be able to
8 then say that that agency--they're records are not within your
9 possession, custody, or control if you're able to go there and get
10 something that's beneficial to you, but when the defense is asking
11 for that you say, "No, you can't," or ONCIX or ODNI. So that's why
12 the defense is asking you to look at that, not only for the purposes
13 of deciding what is in the military's possession, custody, and
14 control, but then also when you taking a look at their due diligence
15 with regards to their--both *Brady* and their 701(a)(2)
16 responsibilities because if you see that the government has spent all
17 this time perfecting its case to the detriment of providing needed
18 discovery to the defense, that, again, supports the need for an
19 accounting, the need for immediate production, and, possibly, the
20 need for additional time for the defense to incorporate this
21 information.

22 Subject to your questions, ma'am.

1 MJ: All right. Can I see the Court calendar for just a moment,
2 please?

3 CDC[MR.COOMBS]: Appellate Exhibit 112 is our proposed one. The
4 government's is 113.

5 MJ: I'll take a look at those. Why don't we start there?
6 Thank you. I apologize. I'm looking to see where we put in here
7 discovery of information on the merits and sentencing, or did we?
8 I'm looking at Appellate Exhibit 70 which is the first court
9 calendar. I know we had the government's reciprocal discovery
10 request, disclosures and information, so, we sort of having it going
11 all the way along, here, with classified information and unclassified
12 information.

13 TC[MAJ FEIN]: Ma'am, in the proposed case calendar, the
14 government also has it spaced out as Motion to Compel Discovery
15 Production, 2, 3, and then a rolling--

16 MJ: So, we're really looking, here, then, at the--it's the
17 motion to compel the defense has filed and discovery coming from the
18 government to the defense that's not involved in your merits or
19 sentencing case at this point. Don't worry. I'll address it when you
20 speak; that's fine.

21 CDC[MR.COOMBS]: Okay. Thank you, ma'am.

22 MJ: Major Fein?

1 TC[MAJ FEIN]: Your Honor, very quickly, so we can, then, focus
2 on each item of the defense's request--ultimately, there's a few
3 points the government would like to highlight from the written brief.
4 First and foremost, the defense continually requests information
5 under R.C.M. 701(a)(2) for information that has always traditionally,
6 and until this novel argument by the defense, has been considered
7 outside of military authorities for the majority of the information
8 we're about to go through. So, up until the point of the actual
9 adjudication in front of a court, the government has maintained from
10 the very first request that the defense has not provided a proper
11 legal basis or factual basis for those pieces of information. And
12 again, we're going to go through each one, but this is going to be a
13 common theme; that's separate and apart from any type of *Brady*
14 obligation. The government has never maintained that there's any
15 information that could be withheld if it's *Brady* material. The
16 government did argue in the very first motion to compel that 701
17 didn't apply to classified information. But, after that was
18 litigated, then absolutely, 701(a)(6) does apply, but *Brady* has
19 always applied. So, if there's *Brady* material out there, it will be
20 turned over to the defense. But that brings us to the second point.
21 If there's *Brady* material out there, that's what the defense is
22 entitled to if it's outside of the 701(a)(2) or a motion to compel
23 production.

1 MJ: Well, let me ask you--well, motion to compel production--
2 let's go that way. The analysis that I read to the defense, assume
3 701(a)(2) doesn't apply, it's not within your custody and control and
4 then we go over to R.C.M. 703----

5 TC[MAJ FEIN]: Yes, ma'am.

6 MJ: ----so are we saying--am I getting your position correct--
7 because I believe I saw it in the defense's brief that if 701(a)(2)
8 doesn't apply, they want to go under the relevant and necessary
9 standard under----

10 TC[MAJ FEIN]: Absolutely, ma'am.

11 MJ: ----R.C.M. 703 and order production.

12 TC[MAJ FEIN]: Yes, ma'am. But they didn't provide any
13 reasoning on why something is relevant and necessary in their brief
14 either. It was kind of a side note if this one novel argument under
15 701(a)(2) doesn't apply, then now 703. The government is ready to
16 litigate all this and that's why we're here today, but since the
17 defense keeps trying to focus on 2 years of making requests. The
18 first discovery requests that the prosecution received was in late
19 July of 2010 and then they started rolling in in September 2010 and
20 the majority of those requests, which the defense has provided you
21 and in the different exhibits and references all had the same canned,
22 broad language of "every and all documents" copied and pasted from
23 701(a)(2) of all of the following organizations. And, despite the

1 government, over the last year and a half stating, "You have not
2 provided a proper legal basis or factual basis," keeps getting the
3 same requests and it is echoed in this round--although this time,
4 some items, as we will go through them, now do have some specificity.
5 But what the government hopes to do is not confuse the Court, confuse
6 the defense on this issue. There are different standards that apply,
7 of course. The defense is always focused on 701(a)(2). At no point
8 does that mean just because they're not entitled to information under
9 701(a)(2), that under a *Williams* search obligation of 701(a)(6), that
10 same information could be discoverable, but it's a different standard
11 and it is only the material that is--or does fall under 701(a)(6)
12 *Brady*.

13 MJ: So, is it the government's position that information in the
14 control of another agency aligned with the government can never be
15 material to the preparation of the defense such that it would be
16 relevant and necessary for production under R.C.M. 703.

17 TC[MAJ FEIN]: Not stated that way; that is not our position,
18 Your Honor. It is just simply under 701(a)(2), to open the files--
19 because 701(a)(2) is, essentially, the open-file discovery rule that
20 makes our system so great and this--American jurisprudence--that we
21 have more--we just hand over the file at preferral and we keep
22 handing over documents which this prosecution and the government has
23 done in this case except for very specific classified information

1 which is what--is the subject of the litigation. So the defense
2 continues to focus on 701(a)(2) and material preparation of the
3 defense within military authorities. Again, general requests, even
4 if it is within military authorities and if it's outside, continued
5 and it wasn't until now that the Court's last ruling that now there's
6 a last comment that says, "Oh, and by the way, 703." So, bottom
7 line, Your Honor, the government does acknowledge that if they make a
8 relevancy and necessity argument and the Court rules in favor under
9 703 and compels production of certain material--first the Court needs
10 to know what they are actually asking, thus the Court will know what
11 to order instead of all files, all information and, at that point,
12 absolutely, the government, then, is compelled--ordered by the Court
13 to go forth, grab those documents through the different processes and
14 if the custodian does not want to freely turn over the documents,
15 then 703(f) provides the procedures to go forth if it's classified,
16 and that's a reason not to turn over, 703(f) has those procedures
17 built into it--point to 505. Then, at that point, yes, the
18 government is going to comply, but that's why we're here today and
19 that's why this process is set up. Most of these, as we go through,
20 we'll bring right back to this point: overbroad requests--semantics
21 do matter; this is a trial. If you want--if the defense wants a
22 damage assessment, that's--
23 they gave us notice--specific notice--is--prosecutors, even for--

1 under material for preparation of defense standard, the Courts have
2 held, they have to give the prosecution enough notice of what to go
3 find. And we have told the defense over and over again, "You've not
4 provided us adequate notice." And once there was enough confusion on
5 the difference between an investigation and a damage assessment, the
6 prosecution voluntarily provided the Court and the defense a legal
7 brief--not an arbitrary definition--in a legal brief based off legal-
8 -with legal citations on what the difference is between these terms
9 to help guide the defense. But, instead, it's opening--trying--the
10 defense is trying to open up the government's files by taking a
11 standard of *Williams* that the CAAF held for interpreting the *Brady*
12 obligation under 701(a)(6) using the term "closely aligned," using
13 that definition and that terminology that we have, on the record, for
14 the defense, listed as the prosecution, every entity we considered
15 closely aligned based off our relationship as prosecutors with those
16 organizations, here's who we determined, under *Williams*, were closely
17 aligned. Therefore, we have the obligation to search--to indeed do a
18 search for *Brady* material--701(a)(6) material in those entities.
19 Above and beyond that requirement, the prosecution has also outlined
20 for the Court that we have undertaken the ethic--made sure that we
21 have identified entities that we might have an additional ethical
22 obligation to search. So, to go back to--I think as the Court--or
23 the government briefed the Court in the previous motions hearing, at

1 the end of the day, there are now six ways that have come up for this
2 information; six authorities that the defense can choose--or excuse
3 me--that the government has an obligation to produce material:
4 701(a)(2) if it is within military authority, a specific request and
5 we litigate it. If we agree, we get it, if we don't, we litigate
6 court orders us. The next three are the *Williams*--the buckets under
7 *Williams* for any *Brady* material, 701(a)(6). So, joint investigations
8 for this prosecution, closely aligned organizations, and, finally, a
9 specific request with a--from a specific entity for *Brady* material.
10 So, that's the first and the then a third--the next three. The last
11 one we've always maintained is our ethical obligation. So, if it's
12 not a specific request from the defense, it's not closely aligned
13 with the prosecution or its not a joint investigation, we, as
14 attorneys, could still have a good-faith basis that information could
15 exist. Therefore, we have an obligation--ethical--to go find it and
16 disclose it if it exists and its *Brady* material. And we've outlined
17 all this in the prior filings as well; all the different
18 organizations and that's where that number 63 the defense keeps
19 using.

20 MJ: Let me ask you a question. The defense, on oral argument
21 advised the Court that, in response to a reasonableness question,
22 that they were looking for these entities of files that were involved
23 in direct damage from the alleged leaks, files involving--I guess

1 labeled or involving PFC Manning and remedial steps to mitigate those
2 leaks. Does the government consider that specific enough?

3 TC[MAJ FEIN]: Your Honor, may I have a moment?

4 MJ: Yes.

5 TC[MAJ FEIN]: I would like to pull an appellate exhibit and
6 reference it.

7 MJ: Yes.

8 TC[MAJ FEIN]: Your Honor the government requests the Court to
9 please reference Appellate Exhibit 12. Appellate Exhibit 12 is a
10 Prosecution supplement to the prosecution's proposed peace calendar.
11 And in that appellate exhibit, the last enclosure is a sample
12 memorandum that the prosecution sent out to different organizations
13 that it determined were closely aligned under the *Williams* case. And
14 I think this will answer another question as well. The prosecution,
15 in anticipation, based on--let me back up, Your Honor, if it pleases
16 the Court. The prosecution understanding the severity and the broad
17 impact that the charged offenses had on the government, anticipated
18 a--I guess discovery--potential discovery issues. So, in order to
19 get ahead of that, as described--as previously described, especially
20 with this appellate exhibit, the prosecution affirmatively, without a
21 defense request, sent out these memoranda to the different
22 organizations--this is a sample memorandum, Your Honor. And if you
23 look at the language--direct you on that enclosure, Your Honor, to

1 the second page, to the first paragraph. On the second page it
2 states, "As indicated above, the prosecution requests that you, the
3 agency or department, conduct an immediate and thorough prudential
4 search of your records for the information above, and that
5 information is personal identifying information of Private First
6 Class Manning and other types of search terms related with this
7 prosecution and the law enforcement investigation." So, any
8 information dealing with Private First Class Manning and also for any
9 information directly concerning Private First Class Manning,
10 including but not limited to any documents that discuss damage or
11 harm caused by PFC Manning and WikiLeaks and any measures considered
12 or taken in response to the activities of PFC Manning or WikiLeaks.
13 So, what the prosecution did, on their own, was to submit these
14 requests to the entities to start finding these records, preserving
15 the records so the prosecution can search through them. But the
16 defense is trying to at this point, Your Honor, to say, "Because the
17 prosecution affirmatively recognized this might become an issue,
18 they're using the same terms that Headquarters DA used in their
19 execution of this request that was sent to the Department of Defense
20 by the Army prosecutor." To suddenly say that is what drives what's
21 material to the preparation of the defense versus the most broad
22 application of anything that could potentially even deal with Private
23 First Class Manning in this court-martial which was the prosecution's

1 intent as evidenced in this example. To find a population of
2 documents and information--not files, not centrally located documents
3 organized in a manner that could be easily identified, pulled,
4 searched, produced, but find the information, sift the information,
5 then allow the prosecution to do their due diligence search at the
6 macro level. But what's happening--it appears is that that same
7 process--the exact language that was used by the prosecution to do
8 this is now being tried--is tried to be used to define what's been to
9 the Department of Defense. Every document that deals with WikiLeaks,
10 every document that might have Private First Class Manning's name on
11 it, doesn't necessarily make it related to this court-martial. I
12 know that might sound odd at first because it is Private First Class
13 Manning's court-martial for compromising national security
14 information through WikiLeaks, but it doesn't necessarily mean it all
15 is. The defense is required, under the rules and the applicable law
16 that interprets the rules to submit specific requests for specific
17 entities and, depending on that request, we can then litigate today
18 what's been asked for and whether it is or is not discoverable.

19 I know that's a much longer answer, Your Honor, than you're
20 looking for, but, again, that should not--the government argues it's
21 a loaded big point of this brief bringing individuals--that standard
22 should not be used for what's material to the preparation of a
23 defense because that means that anything that has Private First Class

1 Manning's name on it or WikiLeaks or both would material to the
2 preparation of the defense and the government--and that's the
3 defense's argument--that is now--because dealing with the amount of
4 classified information, another gray-mailing tactic, one that hasn't
5 necessarily been contemplated in the rules, but definitely, by what
6 the drafters wrote for 701(a)(2), this idea that the entire
7 government's files are open in our open-file discovery system was
8 contemplated, meaning--the defense argues that 701(a)(2) should be
9 interpreted like Rule 16 and the starting premise that Mr. Coombs had
10 just now, with the Court, was "The two are the same, but," and then
11 skips over the "but." If--as the discussion states, 701(a)(2) was
12 developed--to near Rule 16 and then the drafters specifically chose
13 to not use the word "government" and chose "military authorities."
14 So, any analysis of Rule 16, the government offers, is inapplicable
15 to 701(a)(2) because they're completely separate rules when it comes
16 to this issue; military authorities, not military authorities. And
17 if it's not military authorities, then a showing of relevance and
18 necessity, not material to the preparation of the defense, that is
19 how you can compel production.

20 Outside any general questions, Your Honor, we're ready to
21 go through each.

22 MJ: Okay. Let's go through each one.

23 TC[MAJ FEIN]: Yes, ma'am.

1 MJ: Major Fein, do you have them organized in certain fashions
2 or do you--does either side just want me to go step--go name by name?
3 CDC[MR.COOMBS]: The defense has no problem with the Court
4 identifying---
5 TC[MAJ FEIN]: Same, Your Honor. Whatever is easier for the
6 Court, Your Honor.
7 MJ: All right, let's start with the government. Federal Bureau
8 of Investigation?
9 TC[MAJ FEIN]: May it please the Court, may the government
10 respond from the counsel's table?
11 MJ: Certainly. Do you consider them an aligned entity?
12 TC[MAJ FEIN]: I'm sorry, ma'am, can you say that---
13 MJ: Do you consider them an aligned entity?
14 TC[MAJ FEIN]: Ma'am, the Federal Bureau of Investigation, we do
15 consider a closely aligned entity for *Williams/Brady* purposes.
16 MJ: Was there a joint investigation between the FBI and the
17 CID?
18 TC[MAJ FEIN]: Yes, ma'am.
19 MJ: What relevant file--well, what files do they have
20 pertaining to PFC Manning?
21 TC[MAJ FEIN]: Well, ma'am, first, if I may, there's one
22 distinction that needs to be made and that is that the Federal Bureau
23 of Investigation is a very large agency of the federal government.

1 There is a law enforcement arm and then there's the main FBI
2 headquarters. The reason we define this is because all one entity
3 does, does not necessarily equate to what the other does as well.
4 And this will come into play when we talk about an impact statement
5 that the FBI has created and is ready to be filed with the Court
6 under 505(g)(2) by the government. But--so, to quickly answer the
7 question, there was a law enforcement investigation that included
8 Private First Class Manning; there is one that exists, there are
9 files, because it's a law enforcement investigation just like in the
10 Army CID, there's a case file. That case file has been reviewed up
11 to the date of our disclosure to the defense. The entire file that
12 is directly related to Private First Class Manning has been reviewed
13 by the prosecution and any documents in that file that were
14 identified to contain potential *Brady* information, and that would
15 include any information that is favorable to the accused and material
16 to the guilt or punishment--sentencing has been turned over.

17 MJ: Go ahead.

18 TC[MAJ FEIN]: It has been turned over with redactions of
19 material that does not fall within the *Brady* standard, but, in
20 addition, the prosecution has also received approval to turn over
21 other information that would really focus--would be similar to
22 Section III-type items; statements individuals might have made based
23 off PFC Manning making them.

1 MJ: You said this was a joint investigation with CID. I mean,
2 are they mirrored--do they mirror each other? Are they the same

3 TC[MAJ FEIN]: No, Your Honor, they do not. Each agency--the
4 Department of--the Diplomatic Security Services, the Department of
5 State, the Federal Bureau of Investigation, and Army CID each have
6 their own purpose. Although it was a joint--it was coded as a joint
7 investigation because they would share certain information and that's
8 what was done. Army CID only had certain authorities and their
9 focus, of course, was on the charged misconduct of Private First
10 Class Manning, especially downrange and back home and the FBI had a--
11 has and had an on-going investigation that also included Private
12 First Class Manning.

13 MJ: So, if there's an investigation--there's a criminal
14 investigation that is investigating PFC Manning, how would that not
15 be relevant and necessary for production?

16 TC[MAJ FEIN]: Well, Your Honor----

17 MJ: Would the inculpatory parts--that's not material--that's
18 not something that the defense can show the necessity or relevance?

19 TC[MAJ FEIN]: More than likely, Your Honor. In addition to
20 what you're asking, the prosecution, from the very beginning--that's
21 why in every response we've given about *Brady* and that file, the
22 prosecution maintained that we've turned over, at a minimum, *Brady*
23 material. We've also turned over all material that directly relates

1 to Private First Class Manning. The example we've used in a previous
2 session was "returns from grand jury subpoenas." That's in the FBI
3 file; we've turned those over. Private First Class Manning's bank
4 records and phone records--if we don't intend to use those at trial
5 and if we only were following a *Brady* standard, the defense wouldn't
6 be receiving that information.

7 MJ: So what is left in the file that hasn't been turned over to
8 the defense that's germane to PFC Manning? Are you telling me that
9 there's a broader file and this is a piece of it?

10 TC[MAJ FEIN]: Your Honor, Private First Class Manning is a
11 piece of the FBI file, yes.

12 MJ: And of that piece, how much has been turned over--or what
13 remains that has not been turned over to the defense?

14 TC[MAJ FEIN]: Ma'am, may I have a moment because there--we can
15 give you exact. Manning--Your Honor, the FBI law enforcement file--
16 the investigation is much broader than Private First Class Manning.
17 We have turned over all documentation that is germane to Private
18 First Class Manning or any witnesses that we would have identified or
19 we suspect to put on our witness list.

20 MJ: So all these--I guess I'm going to interrupt you for just a
21 second and ask the defense--out of the discovery that you got, what
22 percentage of it is redacted?

1 CDC[MR.COOMBS]: A very large percentage of it, ma'am. In fact,
2 I can give you, now, an example of an unclassified redacted format of
3 information that we received that's from the FBI. Then also, the
4 Court--the government would ask--excuse me, the defense would ask the
5 government provide to the Court the classified versions--just two
6 example--Bates numbers 447635 through 447640, that's five pages
7 there, and 447608 through 447625, just to give you an example of the
8 type of information we're receiving from the government from the FBI
9 file. Normally, what happens is we receive pages that a lion's share
10 of it is simply black and even the entire page is black. And that
11 goes to our identification of *Brady* information for the motion that
12 Captain Tooman will be arguing, but also it goes to the problem of
13 the government now saying that "we're redacting the FBI file that we
14 don't believe is material to the preparation of the defense or falls
15 under our *Brady* obligation." It's no different if they went to the
16 CID file and said, "You know what, we're going to redact this; it's
17 not that--all that important to you. This--they interviewed some
18 witness that was unrelated so we're not going to give you this."
19 They've chosen to redact the FBI file based upon their view of what's
20 important to us. And, because it's a joint investigation, that can't
21 be acceptable. They should hand over the investigative file that
22 deals with my client. And I apologize in advance for giving this to
23 the Court as the example and I know the court reporter is going to

1 look at me--not being too friendly, but this is the grand jury
2 information----

3 TC[MAJ FEIN]: Your Honor----

4 CDC[MR.COOMBS]: ----the government has provided us
5 unclassified. We'd ask that this be marked as the next appellate
6 exhibit.

7 MJ: What--is that grand jury testimony?

8 CDC[MR.COOMBS]: It's the grand jury testimony they provided
9 from the FBI, ma'am, and you will see that there are pages of--
10 basically 30 pages running where it's just complete black.

11 TC[MAJ FEIN]: Your Honor----

12 MJ: Oh, I'd link this to something besides the grand jury, I
13 already made a ruling on that.

14 CDC[MR.COOMBS]: Well, this is an example of stuff coming from
15 the FBI, so then you also have, in addition to that, the two Bates
16 ranges that we've given you. The FBI file--they put as classified as
17 far as their investigative file, so, from that stand point--that's
18 why we're asking that you look at the two Bates number ranges to see--
19 -but this is a prime example of the type of information that we
20 received from the government: heavily redacted to the point that it
21 is very difficult to even put information into context, let alone
22 understand what may be *Brady* and what may not be *Brady* within that
23 information. The government goes, then, to say, "Well, we're giving

1 you at least *Brady*," and they provide a redacted format like this
2 which is very similar to what you'll see in the Bates number ranges.
3 And, again, those Bates number ranges are 447635, 447640, 447608, and
4 44----

5 MJ: 648?

6 CDC[MR.COOMBS]: 447608 and 447625. Just two very small
7 examples, but if the Court even looked at the entire FBI file that
8 the government produced--and, again, the way they produced this to us
9 is not with some index where they would say, "Okay, here's what they
10 have," they give us Bates numbers that say Manning's name, B.
11 Manning, and a Bates number range, kind of like the numbers I just
12 provided to you in files--no particular--in some cases, no particular
13 order. As you go through these, you just see, in many respects, page
14 after page after page of just all blacked-out information. And then
15 you get a few lines in one page and then, again, page after page of
16 all blacked-out information. And that's what it really is driving
17 the defense's request for the government to have to identify
18 precisely what's *Brady* within the files that they're providing that's
19 heavily redacted. But that also is--underscores our motion to compel
20 discovery that the government should provide an unredacted version of
21 the investigative file that deals with my client and that's something
22 that has not been produced. So, again, it's no different than taking
23 the CID file of the joint investigation and just redacting huge

1 portions of it and saying, "This is not all that important." That is
2 the problem the defense has with what the government has provided.
3 So, if they say they have provided the entire FBI case file, it
4 doesn't appear that--to be that way to the defense and it certainly
5 is not in a form in which the defense can actually do anything with
6 because it's heavily redacted to point that it doesn't really have
7 any context.

8 MJ: Major Fein, the--how voluminous is the FBI investigation?

9 TC[MAJ FEIN]: Your Honor, the government will have to get back
10 to you on the entire page count, but the page count that the
11 prosecution has produced to the defense is 8,871 pages, 636
12 documents. And, Your Honor, that does not include the grand jury
13 testimony and--just--the reason I stood up is that's--that grand jury
14 testimony the defense has in open court is currently under your
15 protective order and an Article 3 judge's protective order and should
16 be sealed and not held around in court and it's even stamped as such.

17 MJ: It is?

18 TC[MAJ FEIN]: On subsequent pages, Your Honor, I could take a
19 look at it or--but it was provided under your protective order and
20 your direction, based off the disclosure of the protective order and
21 the Article 3 judge's protective order the defense has acknowledged
22 already.

23 MJ: Mr. Coombs?

1 CDC[MR.COOMBS]: This is provided in unclassified discovery.
2 They provided classified portions of the testimony--the grand jury
3 testimony; that's not anything within that. This is the unclassified
4 discovery that they put on a CD and mailed to me. So, I haven't
5 shared this with anyone other than to ask my legal support, Chief
6 Santiago, to print it up today and bring it up here and hand it to me
7 and now I'm providing it to the Court.

8 MJ: All right. Well, I'll let the court security officer take
9 a look at that.

10 TC[MAJ FEIN]: Your Honor, to clarify, it's not classified, it's
11 grand jury testimony information; protected. And will provide the
12 Court, again, the protection orders that Mr. Coombs and all defense
13 counsel had signed based off of your previous order, the grand jury
14 testimony--federal--the assistant U.S. attorneys went to a federal
15 judge to have it approved to be turned over for limited purposes so
16 that should, at least in our court, also be filed under seal.

17 MJ: All right. So, if I'm considering as part of this, that'll
18 be considered *in camera*, then and----

19 TC[MAJ FEIN]: Yes, Your Honor.

20 MJ: ----you all both have it, right?

21 TC[MAJ FEIN]: Correct, Your Honor.

22 MJ: So, as long as we're not discussing any specifics on what's
23 in it----

1 TC[MAJ FEIN]: Correct, Your Honor.

2 MJ: Okay. So, you've disclosed about 8,000 pages, so do you
3 have any idea of what percentage of the total file that that might
4 be?

5 TC[MAJ FEIN]: Your Honor, it's hard to estimate, but it's
6 probably around 50 percent. Again, this is a very rough estimation
7 and we can get you a number by the end of today. In fact, I could
8 probably have the number before we close the session.

9 MJ: I guess we are confused on this is when you're disclosing
10 the portions of the FBI file--understanding the grand jury is a
11 separate issue, but the other pieces of that file, are they has
12 heavily redacted as what I just witnessed?

13 TC[MAJ FEIN]: Yes, Your Honor, there are some documents that
14 are heavily redacted from the FBI file. The FBI file is much
15 broader, as I previously stated, then just Private First Class
16 Manning and directly related to Private First Class Manning and it's
17 also classified information; the majority of it. So there's multiple
18 authorities to be holding it back. And to answer your question
19 before, Your Honor, the relevant and necessary and how it's not is
20 defense has not made a showing in their motions of why the unredacted
21 portions would be relevant and necessary. So, yes, we can litigate
22 that. I suspect we are going to litigate that, but it has been a
23 701(a)(2) motion up to this point and----

1 MJ: Let's assume for purposes of this litigation----

2 TC[MAJ FEIN]: Yes, Your Honor.

3 MJ: ----that the ruling that I made before that evidence that
4 is material to the preparation of defense can be relevant and
5 necessary under R.C.M. 703--not always is, I'll grant you that, but
6 can be--so we were talking about an investigation by a law
7 enforcement entity against an accused, I guess I'm having trouble
8 thinking about how that's not relevant and necessary.

9 TC[MAJ FEIN]: Your Honor, the government would agree with you
10 for the portions that are relevant and necessary to the accused. I'm
11 not trying to be flippant with this circular argument, but for the
12 portions that are relevant and necessary to the accused, we agree.

13 MJ: Well, how's he going to make particularized assertions when
14 he doesn't know what's in the redacted portions of the file?

15 TC[MAJ FEIN]: Your Honor, the defense actually just--at least
16 has to make an assertion. The government has produced what it's
17 required to produce while balancing--protecting and on-going national
18 security investigation and protecting national security information
19 for those two items and we have turned over the constitutionally
20 protected information. So, it leads us, today, to this litigation;
21 the defense makes the showing and the Court orders all relevant and
22 necessary portions and the prosecution will assume--or would ask if
23 that's what's going to happen, that the prosecution at least be

1 under--be able to file under 701(g)(2) and/or 505(g)(2) or 505(i) if
2 a privilege must be invoked to turn over that portion. But, go back
3 to--we have endeavored to turn over anything that would be considered
4 relevant and necessary. The only reason we're not using that
5 standard is because that was not the standard used when we reviewed
6 the documents. But probably the majority of the information
7 unredacted--the super majority is what is relevant and necessary.

8 MJ: Okay. Are you calling in the FBI agents as witnesses?

9 TC[MAJ FEIN]: No, Your Honor, we're not. But, Your Honor, we
10 did not anticipate doing this because, again, the defense, who have
11 the burden, didn't even make a showing at all on this. So, the
12 government would ask, if the defense is now saying, "We want the
13 information behind the redactions under 703 and here is why," then we
14 would ask that the Court give leave to the prosecution for at least a
15 day to determine if we want to call a witness or not--or need to call
16 a witness.

17 MJ: No, no, no, okay. I'm confusing here. I'm--certainly, I'm
18 not expecting you to run right out and get an FBI agent here to
19 testify right now, I'm saying at trial.

20 TC[MAJ FEIN]: No, Your Honor. Other than possibly for the
21 purposes of authentication, but not for any other purpose. And, Your
22 Honor, in our--as we stated in previous filings and in previous
23 sessions, the only standards we're currently focusing on, because

1 it's affirmative discovery, is 700, 701, 703, *Brady*, but also 914, if
2 we do have someone testify--and of course any statement in any
3 records we've ever looked at that we know exist need to be turned
4 over for them and adopted by the--or the witness that we're calling
5 and others if we qualify an individual as an expert, the basis of
6 their opinion--so there's--the other rules that might apply too that
7 were--we're, of course, tracking and cognizant of, but as far as the
8 case-in-chief or even the--at this point, the case-in-chief or
9 possibly the sentencing case, once the witness list is due, we do not
10 anticipate absent authentication issues and have an FBI agent that
11 focused on Private First Class Manning to call as a witness. --

12 MJ: What kind of access has the government had to those files?

13 TC[MAJ FEIN]: Your Honor, the only access the government has
14 been given is solely to look for *Brady* material.

15 MJ: Is there an unclassified piece to that or is most of all
16 classified?

17 TC[MAJ FEIN]: The entire file is classified, but I am sure that
18 there are portions within a classified document that might be
19 unclassified.

20 MJ: All right. Is there anything else that the government
21 would like to address with the Court with respect to the FBI files?

22 TC[MAJ FEIN]: Yes, Your Honor. So, first we started talking
23 about the FBI law enforcement investigation. The FBI headquarters,

1 through their intelligence organization, also conducted an impact
2 assessment. The prosecution--once the prosecution became aware of
3 that, started working through the authorities to turn over the
4 material--the information that is favorable to the accused or
5 material to guilt or punishment, the *Brady* material, and we have
6 gotten to the final point to where now the government just needs to
7 file a 505(g)(2) motion. And as we stated in our filing in the
8 footnote, it's not that we're withholding it; we're ready to file it.
9 We just need to wait for the case calendar or to have this discussion
10 now. What the government proposes, based off--this could occur at an
11 802 or on the record now--is that as the government comes across
12 classified information such as *Brady* material that exists, that we
13 file immediately those 505(g)(2) requests to the Court so that
14 information can keep churning instead of keeping it all to a certain
15 point. So, if, for instance, we have the FBI's approval, we have a
16 summary that has been created, we just need to put the motion
17 together and file it based off the Court's packets.

18 MJ: All right. Defense, any objections to having rolling
19 505(g)(2)'s?

20 CDC[MR.COOMBS]: Well, again, I guess, the \$25,000 question is
21 when did the government become aware of the FBI impact statement?
22 And once they became aware of it, why didn't they notify the Court?
23 So, if they're saying they just became aware of it recently, then,

1 again, why wasn't--when we asked for any sort of damage assessment or
2 any sort of analysis of these leaks by the FBI--why didn't the
3 government ask for this information and obtain it at that time? So,
4 in this instance, the rolling 505(g)(2)--the problem with this is
5 going to become--unless we build in time at the end to allow us,
6 then, to incorporate whatever information we get, but this
7 information is going to fall on our laps shortly before trial,
8 barring an extension----

9 MJ: Well, with a rolling 505(g)(2) is it's going to fall all in
10 your lap down the road as opposed to coming in----

11 CDC[MR.COOMBS]: No, I agree and so, down that road--the further
12 we go down that road, the closer we are to trial, assuming the
13 current trial date remains the same, and the more difficult it
14 becomes for the defense to even incorporate any of this information
15 into our case. So, that's the problem with this--of the government
16 saying, you know--again, I would like to know when they became aware
17 of it, why they weren't aware of it before, and that would go back to
18 the request for the due diligence--for having to lay out what they've
19 done.

20 MJ: Well, I understand that, Mr. Coombs. And, Mr. Coombs, for
21 the record, the Court is certainly willing to entertain any good-
22 cause motions for continuance. I'm not interested in trying this
23 case before the defense has had a chance to prepare.

1 CDC[MR.COOMBS]: No, and that's exactly what we've asked for in
2 our Motion to Compel Discovery 2. What we're asking is that the
3 Court--if the Court does order the due diligence, give the government
4 2 to 3 weeks to do that, we can continue with the case calendar that
5 does not impact the actual trial--prep like the witnesses, the
6 505(h)(1) notice, and then, once we get that discovery, then give us,
7 at that point, 2 to 3 months to incorporate it.

8 MJ: All right. We were addressing that aspect of this motion
9 at the next session, but I understand the defense argument.
10 Government, are you prepared to tell me when you did learn of this
11 impact statement--or impact assessment?

12 TC[MAJ FEIN]: Your Honor, the government would like to at least
13 have the chance to argue the due diligence argument first and then
14 answer to that could be on the Court's calendar. But what the
15 government would say, at least, is that the defense, again, is
16 confusing the--the defense seems to confuse the issues of what
17 authorities they've asked. Pre-referral they asked for any impact or
18 damage assessment and they listed the FBI in a general request under
19 701(a)(2). The government replied, "You're not entitled to it under
20 that proper authority or proper legal basis or factual basis. So,
21 once the government learned of it, then we started working the
22 approvals. But the government is prepared, today, just because I
23 happen to know that answer, Your Honor, is that it was just a few

1 weeks ago. In fact, I think it was three weeks ago, but, again, this
2 is "I think." I can confirm it at a different time. Now, we
3 received approval, based off of our proposed summaries, to turn it
4 over to the defense. In fact, the time it was--the time of the day
5 we received it, I think was the 18th of May because that was the day
6 we filed our 505(g)(2) for the other two damage assessments. So,
7 that was the day we received the approval and then the next two days,
8 defense started objecting into this procedure we've already litigated
9 about disclosure of ex parte or not. At that point, we needed to
10 notify the FBI and, like every other entity that might be
11 entertaining giving approval under 505(g)(2), that this is the
12 procedure that will likely occur so then they can weigh that decision
13 on how this court is going to handle information in the future and
14 how they're going to disclose or not. So, since then, Your Honor, is
15 when we've had the approval to turn it over. And as we've written in
16 our motion, there's no--the defense even cited it before; 701(a)(6)
17 says, "As soon as practicable." As we cited--or we stated in our
18 motion, it's on the record today. The moment that this prosecution
19 receives approvals to turn over information, unclass, classified, we,
20 as soon as possible, turn it over to the defense. So, once we get
21 it, we start working. This is an example--we didn't have the process
22 in place. We notified the defense and the Court in our filing; it's

1 there. Once we have a process and once we know how the Court wants
2 to handle these, we're ready to go and we can keep being ready to go.

3 MJ: Yes?

4 CDC[MR.COOMBS]: Okay. I guess if the government is saying that
5 they found out about the FBI impact statement prior to or right at
6 the time of their 18 May 2012 disclosure to this court, then we have
7 additional problems. Based upon what the government said about the
8 FBI in that disclosure to the Court indicating that they produced all
9 classified and unclassified documents under 505(g)(1) that are
10 relevant in this case with regards to the FBI. This goes back to the
11 government deciding on its own when it's going to enlighten the Court
12 or the defense when there is certain information out there. The
13 government became aware--no, apparently from what he just said, the
14 government was aware of or got approval to release this information
15 on 18 May. So, that still begs the question of when they found out
16 about it, but why are they not, at the very least, if they don't want
17 to tell the defense, they have to be alerting the Court to the
18 existence of this information. What they're representing to the
19 Court on 18 May is that they reviewed everything that's favorable to
20 the accused and material to either guilt or punishment and they've
21 turned over everything; that's what they're representing on 18 May.
22 If they were aware--obviously they were aware of this impact
23 statement, they just didn't have authority to turn it over, but they

1 should have stated within their--"Oh, by the way, ma'am, the FBI has
2 an impact statement. We're currently working the process for
3 approval to turn this over."

4 MJ: All right. Government, what's your position on that?

5 TC[MAJ FEIN]: Your Honor, we're trying to find the document----

6 CDC[MR.COOMBS]: 18 May 2012 Prosecution Disclosure to the
7 Court.

8 MJ: Bailiff, if you would, why don't you give Major Fein my
9 copy?

10 [The bailiff did as directed.]

11 MJ: Oops. That may not be the same thing.

12 TC[MAJ FEIN]: Your Honor?

13 MJ: Let me have that back.

14 TC[MAJ FEIN]: Well, this will work as well. Your Honor----

15 MJ: Oh, it is the same. Hold on. Okay, that's fine. Why
16 don't you just take the appellate exhibit, itself? And if you would
17 please announce for the record what appellate exhibit it is.

18 TC[MAJ FEIN]: Yes, Your Honor. Your Honor, I was just handed
19 Appellate Exhibit 125. I'm also holding--so, Your Honor I was just
20 handed Appellate Exhibit 125 which is the prosecution's disclosure to
21 the Court on 18 May 2012. I'm also holding--because this will--it's
22 a consistent application, here, of what the government has been
23 saying--the Prosecution's Response to Supplement to Defense Motion to

1 Compel Discovery Number 2, dated 31 May 2012, which is Appellate
2 Exhibit 100. And I'm looking at page 4 of Appellate Exhibit 100 and
3 page 2 of Appellate Exhibit 125.

4 MJ: All right.

5 TC[MAJ FEIN]: Your Honor, both of these, the focus is the
6 Court's order was to turn over forensic results and investigative
7 files. This gets back to the issue that was already litigated last
8 session. Investigative files have a specific terminology. We
9 complied with the Court's order and we disclosed it. As noted to
10 ensure the Court was properly informed and the defense, in Appellate
11 Exhibit 100, on page 4, the prosecution even gave notification,
12 again, about law enforcement files and then, in the second paragraph,
13 we also further requested that they search their entire records to
14 disclose to the Court this information. It goes back to general
15 requests and words do matter, Your Honor. The government is not
16 trying to play fast and loose with terminology. We are trying to
17 execute specifically what the defense is requesting. It makes it
18 much easier if we are told. Only once in pre-referral discovery,
19 and, as I stated before, in a mass request was, under 701(a)(2), "Any
20 impact or damage from these organizations." We replied, "You did not
21 provide an adequate basis--or legal basis--factual or legal basis.
22 You're not entitled to it." It was never readdressed. We were on
23 notice for *Brady* purposes, we started looking into it, we found it,

1 we got approval, we notified on 18 May--or--excuse me, Your Honor, 31
2 May in this filing. And the prosecution is standing here, today,
3 saying we are ready to actually turn over the summary to the defense
4 once the Court reviews it and if the Court authorizes the
5 substitution. But it is not an investigative file and, although it
6 is understandable that the FBI is the Federal Bureau of Investigation
7 and a very large organization--it is a very large organization within
8 the executive branch. The investigators are not directly tied to
9 and, in fact, we were told by FBI headquarters--with the damage
10 assessment--excuse me, the impact statement, that the investigating
11 office--field office within the FBI had no input or even contact with
12 any aspect of the impact statement; it was a completely separate
13 function.

14 I'm returning to the bailiff, Your Honor, Appellate Exhibit
15 125.

16 MJ: Okay. Government, from now on, when you have these 505(g)
17 requests, is the next session; file them immediately-----

18 TC[MAJ FEIN]: Yes, Your Honor.

19 MJ: ----and file a redacted copy just like you did last time.

20 TC[MAJ FEIN]: Yes, ma'am.

21 MJ: Any--is the government are going to use any evidence for
22 any information from this FBI impact statement in their case-in-chief
23 or rebuttal or sentencing?

1 TC[MAJ FEIN]: Not in the case-in-chief, Your Honor, and more
2 than likely, there will be a witness to testify about information
3 that's contained within that assessment during the sentencing case.

4 MJ: Same permission being turned over to the defense?

5 TC[MAJ FEIN]: Yes, Your Honor. If it is going to be used, it
6 will be turned over to the defense.

7 MJ: As part of this----

8 TC[MAJ FEIN]: Yes, Your Honor.

9 MJ: ----provision that I'm going to review?

10 TC[MAJ FEIN]: Absolutely, Your Honor.

11 MJ: Will the pieces of it that you are going to--or intending
12 on using be identified for me when I'm doing my 505(g)(2) review?

13 TC[MAJ FEIN]: Your Honor, that was not the government's intent
14 because the issue is is that the government does not intend to use
15 the document, itself, but call an expert witness and if the expert
16 witness uses it as the basis of their opinion, that's how it would
17 become discoverable. So, the bottom line is that if there's
18 information in it, then, no, that information will not be used by the
19 government in any regard on sentencing.

20 MJ: So, is this expert witness going to be familiar with the
21 entire assessment?

22 TC[MAJ FEIN]: Well, if they are, Your Honor, then they cannot
23 testify because that would be the basis--that would be used as the

1 basis of their opinion and if we're not turning it over, making it
2 available to the defense, then no. A very long answer, but, no, Your
3 Honor.

4 MJ: Okay, now I'm confused. So, we have an expert witness that
5 may make an opinion that's based on a piece of this assessment?

6 TC[MAJ FEIN]: Yes, Your Honor.

7 MJ: Okay. And what you're telling me is the piece of the
8 assessment, plus the *Brady* 701(a)(6) is what you're proposing in your
9 substitutions?

10 TC[MAJ FEIN]: Yes, Your Honor. And----

11 MJ: But you're not going to identify for me that piece in there
12 that----

13 TC[MAJ FEIN]: Well, essentially, Your Honor----

14 MJ: ----it would be referring to?

15 TC[MAJ FEIN]: ----it would be probably easier to--easier
16 understanding--because I'm not articulating this well--is that if
17 there--wherever expert witness is taking the stand on sentencing
18 would only be basing their opinion on that material and nothing else
19 and if it is anything else, then that information will be produced to
20 the defense, but it will not be from that damage assessment unless it
21 has been provided to the defense. So, a damage assessment, as you've
22 seen from the Department of State and you've seen probably from
23 others you have reviewed, typically, are consolidated from multiple

1 organizations. So, it's conceivable that a certain witness be from
2 one organization testifying on information that also was included in
3 a consolidated document. It does not necessarily mean that
4 individual understood or knew information that was part of a
5 consolidated document. But, the bottom line, Your Honor, there will
6 not be any expert witness testifying on sentencing that the basis of
7 their opinion will not be produced, in some form, to the defense.

8 MJ: All right. Yes?

9 CDC[MR.COOMBS]: Just to--maybe a point of clarification, the
10 government, not more than 5 minutes ago, indicated that they were not
11 calling anyone from the FBI and then, now, apparently they're calling
12 a sentencing witness from the FBI.

13 MJ: Is this expert from the FBI?

14 TC[MAJ FEIN]: Well, first, Your Honor, the question was: "Do
15 we intend to call an FBI agent to the stand for our case-in-chief or
16 on sentencing?" No, we do not.

17 MJ: All right, let me broaden that: do you intend to call
18 anyone from the FBI that is familiar with either the investigation
19 from the law enforcement end of it or the impact statement from the
20 headquarters end of it?

21 TC[MAJ FEIN]: We'll know for sure, Your Honor, if it is an
22 analyst or someone as part of the impact assessment by 22 June.

23 MJ: Okay. And that's the----

1 TC[MAJ FEIN]: That is the currently--current scheduled date for
2 the witness lists to be exchanged.

3 MJ: All right.

4 TC[MAJ FEIN]: Whatever that date is on our case calendar, Your
5 Honor, by the time we submit a witness list, that is when that
6 determination will be made.

7 MJ: Yes.

8 CDC[MR.COOMBS]: The problem is the Court's question is wanting
9 to know who they are going to be calling from the FBI to determine
10 what portion of the FBI file may either fall under 701(a)(2) or be
11 relevant and necessary for purposes of 703. And so that's the basis
12 for the Court's question if the defense understands it correctly.
13 So, the government waiting until 22 June or some other date to
14 indicate which witnesses it intends to call from the FBI, then,
15 basically frustrates the request of the defense to get an unredacted
16 copy of the law enforcement file, relevant to my client.

17 MJ: Well, that's--well, we're now talking about the impact
18 statement, not the law enforcement file, if I'm understanding what
19 you're ----

20 TC[MAJ FEIN]: That's what I thought, Your Honor.

21 MJ: What I would like in my 505(g)(2) reviews is to include--I
22 don't care if you know the exact name, if it's Witness A or Witness
23 B, they're going to testify to the same thing--but what is the

1 portion of what you intend to disclose that you--the government
2 intends to have a witness come in and testify about.

3 TC[MAJ FEIN]: Yes, Your Honor.

4 MJ: So that way I can have a more intelligent opportunity to do
5 a 505(g)(2) review in light of the criteria I'm considering on behalf
6 of the defense.

7 TC[MAJ FEIN]: Yes, Your Honor.

8 MJ: Okay.

9 TC[MAJ FEIN]: Your Honor, to answer your question about the
10 total--the size of the FBI file that would be germane to this court-
11 martial, it's 42,000 pages total. My estimation of 50 percent was
12 not correct. A total of 3,475 documents and the number, again, that
13 is just--that we produced to the defense was 8,741--636 different
14 documents.

15 MJ: Different documents or different pages?

16 TC[MAJ FEIN]: I'm sorry, 636 documents, 8,741 pages.

17 MJ: And how many total documents did you say?

18 TC[MAJ FEIN]: 3,475, Your Honor, and 42,135 pages.

19 MJ: So, we're not nearly at the 50 percent level, are we?

20 TC[MAJ FEIN]: No, Your Honor, I grossly mis-underestimated.

21 MJ: Okay. Anything else with respect to the FBI files?

22 TC[MAJ FEIN]: No, Your Honor.

23 MJ: Okay. Let's move to DSS.

1 TC[MAJ FEIN]: Your Honor, the government has maintained we've
2 produced all files on the DSS that relate to Private First Class
3 Manning or WikiLeaks.

4 MJ: What files exist?

5 TC[MAJ FEIN]: Your Honor, there was a law enforcement file at
6 the law enforcement organization and we asked for everything, they
7 gave us everything that they claimed--the memo said it's everything
8 and we produced all of that to the defense, I think, in one
9 production. On 6 December 2011, it was 79 pages, 26 documents.

10 MJ: Okay. Defense, do you contest that?

11 CDC[MR.COOMBS]: Well, again, if the government is representing
12 in open court that the Department of State's investigative file into
13 the alleged leaks, 251,000 cables comprises of 79 pages, then
14 obviously we're not in a position to challenge that, it just--that
15 doesn't strike the defense as being in common sense. You would think
16 the investigative file would be larger than 79 pages.

17 MJ: Okay. And I assume you've asked them?

18 TC[MAJ FEIN]: We've asked, we've looked, Your Honor, and that's
19 what it is.

20 MJ: Okay. And do you consider them an aligned organization?

21 TC[MAJ FEIN]: A joint--yes, yes, Your Honor; DSS.

22 MJ: All right.

23 TC[MAJ FEIN]: Your Honor, may we have a moment?

1 MJ: Yes.

2 TC[MAJ FEIN]: And just for clarity purposes, Your Honor, we're
3 talking about the DSS investigative file. So, not the rest of the
4 Department of State because it is the law enforcement arm.

5 MJ: Does the law enforcement arm of the Department of State
6 contain any other file other than the law enforcement file pertaining
7 to PFC Manning?

8 TC[MAJ FEIN]: Not--no, Your Honor, not investigative file. It
9 could have other information that we have not reviewed, but not part
10 of the investigative file. We have reviewed the entire investigative
11 file. The file--the folder that says, "WikiLeaks" or "Manning,"
12 however they categorize it and organize it, we have all the
13 documents, we've produced all of them.

14 MJ: All right. Department of State, as a whole?

15 TC[MAJ FEIN]: Your Honor, first the government maintains the
16 Department of State is not part of the Department of Defense,
17 therefore it is not within military authorities so 701(a)(2) does not
18 apply.

19 MJ: Do you consider them aligned?

20 TC[MAJ FEIN]: Yes, Your Honor, we do consider them aligned--
21 closely aligned for *Williams* purposes.

22 MJ: Okay.

1 TC[MAJ FEIN]: As far as knowledge and access, Your Honor, the
2 prosecution, in meetings, gained knowledge. The prosecution does not
3 have access except for whatever information we have been given and
4 that does not--we have not been able to get--although we're
5 coordinating--review their files, they haven't been accumulating
6 them, but as from the filing you received from the government, the
7 enclosure to our response--in the Government's Response to the
8 Defense's Supplement to the Motion to--the Defense's Motion to Compel
9 Discovery 2 provided a--almost--primer for the organization and
10 function of the Department of State, a very large organization, and
11 they are currently accumulating their files for us to review for
12 Brady material, 701(a)(6).

13 MJ: Okay. And are you in a position to tell me when you asked
14 them to do that?

15 TC[MAJ FEIN]: We would argue, Your Honor, that that should be
16 presented during the----

17 MJ: All right, that's fine.

18 TC[MAJ FEIN]: ----due diligence argument.

19 MJ: That's fine.

20 TC[MAJ FEIN]: Your Honor, the--that's--so, the Department of
21 State, as a whole--that is the government's position. There are
22 specific--now, in this last motion to compel, there are some specific
23 information and entities that we could also discuss.

1 MJ: Okay.

2 TC[MAJ FEIN]: The government does agree that a--the defense has
3 made specific requests when it comes to the categories and subjects.
4 The mitigation team, the WikiLeaks working group, the chiefs of
5 mission cables, and the Department of--certain Department of State
6 reporting to Congress as evidenced by the defense's submission of
7 Ambassador Kennedy's testimony from March 2011, that information is
8 still not within military authorities. This prosecution doesn't have
9 the information, doesn't have access to it for any purpose. The
10 Department of state does intend to provide that material to the
11 prosecution to review for Brady material. And, as we've noted
12 before, the government is providing--the Department of State is
13 providing witnesses to the defense tomorrow to explain what does and
14 does not exist.

15 MJ: All right. Is the government using any of this--any
16 evidence from any of these--well, you've already turned over the one
17 piece of evidence, but the evidence that you're going to be
18 reviewing, is the government using any of that in its case -in-chief,
19 rebuttal or aggravation?

20 TC[MAJ FEIN]: Not our case-in-chief, Your Honor. Of course, we
21 haven't seen the information, so, at this point, I couldn't say we're
22 even using it in sentencing, but we don't know, Your Honor, because
23 we have not even reviewed it.

1 MJ: All right. So, at this point, do you know if you're
2 calling any witnesses from the Department of State who are familiar
3 with these documents?

4 TC[MAJ FEIN]: We more than likely are, Your Honor, and if we do
5 call them and they are testifying on any subjects of that matter and
6 they use it as the basis--if we qualify them as an expert, they use
7 it for the basis of their opinion, then it will be disclosed and will
8 be produced in some form to the defense.

9 MJ: All right. Anything further with the Department of State
10 from either side?

11 CDC[MR.COOMBS]: No, ma'am, other than what we highlighted as
12 the due diligence requirements for these other sub-organizations, but
13 nothing in addition to that.

14 MJ: All right. Department of Justice?

15 TC[MAJ FEIN]: Your Honor, the Department of Justice, again,
16 not--it's a separate department, not the Department of Defense. It
17 does not fall within military authorities----

18 MJ: Do you consider yourself aligned for *Williams* purposes?

19 TC[MAJ FEIN]: We do, Your Honor, and we define, as we've done
20 in our five--multiple filings for the purposes of clarity of the
21 defense and the Court, the Department of Justice to be Main Justice,
22 the headquarters, the media subordinate organizations in the
23 headquarters, and the U.S. Attorneys offices, not the subordinate

1 agencies like the FBI and others, for this purpose. We have produced
2 any--there is no damage assessments; we've asked, there aren't any.

3 MJ: What files are there that pertain to PFC Manning?

4 TC[MAJ FEIN]: The only files there would be is prosecutorial
5 files, Your Honor, and grand jury testimony which we have produced
6 the *Brady* information from the grand jury testimony.

7 MJ: All right. So, no investigative files, no damage
8 assessments, no----

9 TC[MAJ FEIN]: No, Your Honor, that is left to the FBI as we
10 have been told by the Department of Justice.

11 MJ: So there is nothing--or what you're telling me is that
12 there's nothing you're searching within the Department of Justice at
13 this time?

14 TC[MAJ FEIN]: We have been told--that's correct, Your Honor.
15 We've been told that anything the Department of Justice would have
16 that would fall under the criteria we submitted is in the FBI file
17 except the grand jury and we did that separately.

18 MJ: Okay. Defense? Anything?

19 CDC[MR.COOMBS]: Again, we're in the position of taking the
20 government's representations, so, if the Department of Justice has
21 nothing in addition to the grand jury, then we would just simply ask
22 that you take a look--at least the unclassified version of the grand
23 jury testimony that we presented to show you the amount of

1 information the government has chosen to share with the defense and
2 how it's really, essentially, useless when you look at the amount of
3 redactions.

4 MJ: I mean, we've already addressed the grand jury issue.
5 Okay. CIA?

6 TC[MAJ FEIN]: Your Honor, the Court--we--the government first
7 argued that they're not--do not fall under military authorities,
8 they're an independent intelligence agency, therefore, 701(a)(2) does
9 not apply. We do consider them closely aligned for *Williams*
10 purposes. We have started and continue to review their files for
11 *Brady* material, we have not completed that; it's an on-going process
12 as well. Their damage assessment or report has been produced to the
13 Court and subject, currently, to the Court's order--or future order.

14 MJ: Either of their files that are germane?

15 TC[MAJ FEIN]: There are investigative files which we recently--
16 or we previously spoke about and those forensic results or
17 investigative files have been produced to the defense.

18 MJ: So, what's left for review?

19 TC[MAJ FEIN]: Excuse me--sorry--excuse me, Your Honor, the
20 *Brady* material of the file has been produced. Your Honor, the only
21 thing left to review are other documents that have been accumulated
22 pursuant--that would fall under the similar request that we've
23 highlighted as an example to the Court.

1 MJ: Will there be any witnesses from this entity testifying in
2 the government's case-in-chief, rebuttal, or sentencing?

3 TC[MAJ FEIN]: Yes, Your Honor, both. And the underlying
4 information that they would be testifying to has been or will be
5 provided to the defense depending if it's on the merits or if it's on
6 sentencing.

7 MJ: Will any of them be testifying about anything I just
8 reviewed?

9 TC[MAJ FEIN]: No, Your Honor.

10 MJ: Anything from the defense?

11 CDC[MR. COOMBS]: Just based upon the government's statements
12 that they're just now reviewing certain documentation, the CIA, why
13 that hasn't been done before. I would go back to the due diligence
14 and the fact that there is certain documents, apparently, that these-
15 -whoever they call from the CIA will be testifying to but have not
16 yet been produced to the defense. So, unless it's this information
17 they're seeking some sort of protective order for under 505(g)(2) or
18 privilege has been invoked. Why hasn't this information been turned
19 over to the defense at this time?

20 MJ: Major Fein?

21 TC[MAJ FEIN]: Absolutely, Your Honor. First, to clarify, I did
22 not--the government did not say, just now, that we're just starting
23 to review documents. We have been and continue to review documents.

1 It's a massive amount of documents, Your Honor, it just takes time,
2 especially based off of the charged offenses.

3 The--first, the merits. The defense has had the evidence
4 that the witnesses on the merits will be testifying about since, I
5 think, 8 November 2011 when we handed over all of--the majority of
6 classified evidence that we intend to use in this case. So, any
7 information that would come from the CIA and that would ever--
8 whatever form and on whatever subject matter, they've had in their
9 possession for them in any of their experts to review. So, really my
10 answer was focused on sentencing--any experts--and any experts that
11 are qualified who rely on any information, that information, just
12 like we spoke about the others, will be provided to the defense if
13 they are going to rely on documentation. And the documents that you
14 have reviewed, Your Honor, although contained--could--Your Honor, in
15 reference to your documents--the documents you have reviewed, any
16 information that could be aggravating, we do not intend to use.

17 MJ: So, this witness that you're going to call on sentencing
18 from this organization, is not basing his or her testimony on
19 anything that I reviewed?

20 TC[MAJ FEIN]: That is absolutely correct, Your Honor.

21 MJ: Yes?

22 CDC[MR.COOMBS]: Again--and it seems as if Major Fein is saying
23 the witness is going to be testifying and the basis of that witness's

1 testimony will be provided to the defense. So the question is: is
2 the basis of that expert's testimony information that they've already
3 provided, or is this, somehow, some other information that they're
4 going to be providing to the defense? And then, if the answer is the
5 latter, it's some other information that they're going to be
6 providing to the defense, well, the time for providing that is now;
7 this is the discovery stage. So, that's the issue that I think we
8 need clarification.

9 MJ: Yes. While looking here as the government has stated,
10 Government, the witness list exchange is scheduled for the 22nd of
11 June, is that correct?

12 TC[MAJ FEIN]: It's currently scheduled, yes, Your Honor.

13 MJ: There may be a discrepancy here on when the government's
14 witnesses come out--are disclosed and when the defense witnesses are
15 disclosed based on the discovery timelines that we have here. Is the
16 government--and I'll give you some time to think about this--I would
17 like to continue on with the 22 June disclosure of the government's
18 witnesses so we have all these issues flushed out as I'm doing these
19 reviews along the way, rather than doing a second review prior to the
20 trial when these theories are developed. I plan to keep the
21 government on track on 22 June.

22 TC[MAJ FEIN]: Your Honor, also, I think will could help the
23 Court for this is, really, the government offers the real question to

1 be answered is what do we not intend to use, not what we intend to
2 use because if we intend to use something, the rules require us to
3 give access and turn over to the defense. So, what will probably
4 help more----

5 MJ: Problem with my review is I have to look at the document as
6 a whole----

7 TC[MAJ FEIN]: Yes, Your Honor.

8 MJ: ----and decide if the snippet that you intend to use is
9 sufficient to allow the defense an opportunity to cross-examine the
10 witness----

11 TC[MAJ FEIN]: Yes, Your Honor.

12 MJ: ----and all that kind of thing and I can't do that if I
13 don't know what it is that the government is going to introduce.

14 TC[MAJ FEIN]: Yes, Your Honor. What the government is
15 confident on is there really isn't that much that is not going to be
16 approved to be used and our filing--whatever it is that the Court
17 decides on how we notify the Court on the type of aggravation we're
18 going to be allowed to use, versus all the aggravation that we're not
19 going to be allowed to use about the impact of this case on the
20 national security. I think when we provide that to the Court, it
21 will be very clear because there are very specific categories and
22 very specific sources of information that are so sensitive that they
23 can't be used and that's what we will likely propose that we provide

1 you in some form once we discuss it with the Court on the record,
2 whenever that will be, and discuss it with the equity holders who own
3 the information to get authority.

4 MJ: All right. ODNI?

5 TC[MAJ FEIN]: Yes, Your Honor. The government considers--
6 first, ODNI is not part of the Department of Defense military
7 authority 701(a)(2). We do consider ODNI a closely aligned
8 organization because they have provided information that the defense
9 has had in their possession since on or about 8 November 2011 that we
10 intend to use on our case-in-chief, so we consider them closely
11 aligned. ODNI is the parent organization of multiple independent
12 organizations such as NCIX. So, as we've noted in our filings, we,
13 just like DOJ, consider ODNI Main ODNI and not its subordinate
14 organizations. So, we have started and are almost finished reviewing
15 ODNI's documents for any *Brady* material to contradict----

16 MJ: All right. You talked to me about whatever you're using in
17 your case-in-chief has already been given to the defense?

18 TC[MAJ FEIN]: Yes, Your Honor. Other files we are reviewing
19 for *Brady* material.

20 TC[MAJ FEIN]: Under our general due diligence requirement, Your
21 Honor, of--based off the criteria we've given you as an ex population
22 of possible documents just to make sure there is nothing that could
23 be *Brady* material.

1 MJ: Are there specified types of files that you're reviewing?
2 I mean, do you just walk in there and say, "Let me review all your
3 files"? I mean--I guess--what are you targeting?

4 TC[MAJ FEIN]: Ma'am, the cabin doors that we target are in that
5 example that we--I briefed earlier. It is specific information
6 concerning Private First Class Manning--identifying information such
7 as usernames and IP addresses, any type of impact information or
8 damage, because, of course, if it's mitigating, it's discoverable.

9 MJ: Yes?

10 CDC[MR.COOMBS]: With regards to ODNI, then, I would like to
11 have the government respond to the Court's question of whether or not
12 ODNI has any damage assessment, investigation, working paper, however
13 you want to define that, similar to ONCIX with----

14 MJ: So--not ONCIX--one--a separate one?

15 CDC[MR.COOMBS]: Correct.

16 MJ: Can you answer that question?

17 TC[MAJ FEIN]: Absolutely, Your Honor, it's actually on page--
18 Your Honor, the Prosecution's Response to Defense Motion to Compel
19 Discover Number 2, dated 24 May 2012, Appellate Exhibit 97.

20 MJ: Okay.

21 TC[MAJ FEIN]: Bottom of page 12, footnote 12. ODNI does not
22 maintain investigative files and is only closely aligned under
23 *Williams* because they have contributed evidence for the merits. They

1 do not have a centralized file. This is part of what, as I described
2 before--a due diligence search that we are doing because they've
3 provided evidence that we intend to use on the merits and we have
4 asked them, based on that criteria, to accumulate some records for us
5 to look for *Brady* material.

6 MJ: Do they have a damage assessment?

7 TC[MAJ FEIN]: No, they do not have a damage assessment, Your
8 Honor.

9 MJ: Okay.

10 TC[MAJ FEIN]: Or law enforcement files or forensic results.

11 MJ: All right. And are you triggering your question from some
12 *Brady* material that you've already received?

13 CDC[MR.COOMBS]: Yes, ma'am, the 12 pages of *Brady* information,
14 some of that is directly responsive to ONCIX and other information is
15 directly responsive to ODNI. So, it appears that----

16 MJ: Can you point back to me in the record? Where would that
17 be?

18 CDC[MR.COOMBS]: That should be the Attachment A to our motion
19 to compel and as well as that, with regards to the motion to dismiss,
20 that should be an attachment with that.

21 MJ: To the motion to compel, itself?

22 CDC[MR.COOMBS]: I believe so, ma'am, yes. And then also----

1 MJ: Okay, I have--oh, I see. No, I have Attachment A as the 17
2 April letter on that one.

3 CDC[MR.COOMBS]: Okay.

4 MJ: I did see it in one of these.

5 CDC[MR.COOMBS]: It should be, maybe, 31?

6 MJ: Why don't we do this: we've been at this for quite some
7 time. Why don't we take a brief, about 10-minute recess? Is that
8 good for everybody?

9 TC[MAJ FEIN]: Yes, Your Honor.

10 MJ: A little bit longer than 10 minutes, or is 10 minutes fine?

11 CDC[MR.COOMBS]: 10 minutes is fine with the defense.

12 TC[MAJ FEIN]: Ma'am, that's fine.

13 MJ: All right. Court is in recess until 25 minutes to 1600 or
14 4 o'clock.

15 **[The Article 39(a) session recessed at 1525, 6 June 2012.]**

16 **[The Article 39(a) session was called to order at 1545, 6 June 2012.]**

17 MJ: This Article 39(a) session is called to order. Let the
18 record reflect that all parties present when the Court last recessed
19 are again present in court.

20 All right. Are we finished with ODNI?

21 CDC[MR.COOMBS]: Just the--Appellate Exhibit 43, ma'am, was the
22 appellate exhibit we wanted you to take a look at. This was the 12
23 pages of *Brady* that we received. What is highlighted, there, is just

1 one of the memorandums and it looks to be addressed to ODNI and there
2 may be--because ONCIX is a suborganization under ODNI, that may be
3 also addressed to ONCIX, but that was the reason why the defense
4 believed ODNI may have something responsive to our request.

5 MJ: All right. Major Fein, are you triggered on the same
6 enclosure to Appellate Exhibit 43 that I am?

7 TC[MAJ FEIN]: Yes, Your Honor, I've looked at it.

8 MJ: Is this--going back to ONCIX, is this a sub-entity of ODNI
9 or is this something separate?

10 TC[MAJ FEIN]: That is correct. So, it looks like that Robert
11 Bryant address had ODNI on it and then ONCIX. I assume that is the
12 proper addressing convention for whomever sent that letter, but
13 Robert Bryant was the ONCIX presidential appointee, the National
14 Counterintelligence Executive; his office is ONCIX.

15 MJ: So there's no new damage assessment in ONCIX?

16 TC[MAJ FEIN]: That is correct, Your Honor.

17 MJ: Okay.

18 TC[MAJ FEIN]: ODNI does not have any damage assessments or any
19 records that would reflect that; it's ONCIX

20 CDC[MR.COOMBS]: And that was the reason why the defense
21 believed it was a possibility.

22 MJ: Okay. Moving to ONCIX.

23 TC[MAJ FEIN]: Yes, Your Honor.

1 MJ: Let me start off with asking a question: I ruled on the
2 23rd of March that ONCIX was an aligned entity, the government, in
3 their response after that--I don't remember which one--said you
4 disagree with me but you're not challenging that ruling. If ODNI is
5 a closely aligned--but ONCIX is a sub entity, I guess I'm confused as
6 to how they are not closely aligned.

7 TC[MAJ FEIN]: Well, Your Honor, the government has tried all of
8 its filings to explain to the Court and defense that it would be--
9 would place the government, probably, in an untenable position to
10 assume that the parent organization of a department or agency that
11 has subordinate departments and agencies are--fall--or are almost
12 imputed with our determination of being closely aligned or not. So,
13 we have, as prosecutors, assessed the facts of our relationship with
14 them, the different information sharing, or whether we're using
15 charged documents that exist or not at all these other factors to
16 determine that--make that determination of whether they're closely
17 aligned. So, just like the Department of Justice, FBI and all the
18 other organizations under the Department of Justice, we've defined
19 ODNI versus NCIX. ODNI has provided a classification review the
20 defense has had. That's located in Appellate Exhibit 97--or we
21 referenced that in Appellate Exhibit 97, page 8, footnote 11,
22 including the Bates numbers of the two documents. So, because ODNI
23 provided a classification review and authority for us to use evidence

1 on the merits, we considered ODNI a closely aligned organization for
2 *Williams* for us to do our due diligence to search their files, their
3 information to determine if there's any *Brady* material, versus NCIX
4 who we have no relationship with other than we had an ethical
5 obligation from the beginning and then, based off the discovery
6 request of the defense, a--additionally a *Williams-Buckett* Three
7 requirement to obtain information, but not----

8 MJ: So there is a damage assessment for ONCIX, is that right?

9 TC[MAJ FEIN]: That is what we've been told, Your Honor, based
10 off the filing we have now done, correct.

11 MJ: Okay. So, really, I guess at the end of the day, does it
12 matter if they're aligned or not if you are going to do the same
13 review?

14 TC[MAJ FEIN]: Well, they--no, Your Honor. In the end, we'll do
15 a *Brady* review. The only reason we're defining with particularity on
16 what obligation we have is because it's whether it's based off a
17 defense request or not or whether we're doing our ethical
18 obligations. The only reason we've had to define this is only
19 because of this 701(a)(2) argument and the way it has morphed; that's
20 why we're doing it. At the end of the day, Your Honor--your
21 question, if there is *Brady* material, we're searching.

1 MJ: So, for ONCIX, other than going and asking them for this
2 damage assessment for *Brady* material, what other relationship have
3 you had with them?

4 TC[MAJ FEIN]: Could you----

5 MJ: Other than asking them to review this damage assessment,
6 what other relationship have you had with them? Did they provide any
7 evidence, any witnesses----

8 TC[MAJ FEIN]: Not--no other relationship, Your Honor.

9 MJ: Okay. Is there any--are there additional files that you're
10 reviewing other than the damage assessment?

11 TC[MAJ FEIN]: We have submitted this same form of a request
12 that we discussed already on the record; a more macro level request
13 of any other documents but it should only be those documents that
14 lead up to the damage assessment because that's really their sole
15 function from our understanding.

16 MJ: All right. And as I understand this you haven't reviewed
17 it yet, right?

18 TC[MAJ FEIN]: That is correct, Your Honor.

19 MJ: So, at this point, are you in a position to tell me whether
20 you're going to use any evidence from it or call any witnesses
21 pertaining to it?

22 TC[MAJ FEIN]: No, Your Honor, we don't even know--other than
23 what information might--from other independent organizations have fed

1 into it based off what the defense has already referenced, the 28
2 different--I think it was 28--the more than 20 different damage
3 assessments, impact statements, or any other variation of damage
4 that's occurred that we have produced to the defense as we get them
5 and get approval to turn them over, other than that, because, as the
6 defense has pointed out, most of those were done pursuant to the
7 request by NCIX. There is nothing else that we know of.

8 MJ: I guess I'm confused. If you've done enough of the review
9 of that assessment to do--to turn over the *Brady* material, how did
10 you not review the rest of it?

11 TC[MAJ FEIN]: Your Honor, I apologize. That is not what I
12 intended to relay. The NCIX, as explained in the government's filing
13 to explain the difference between assessments and investigations,
14 NCIX's charter to do a national-level national counterintelligence
15 review, a damage assessment at the national level, that's what
16 they're--the Counter-Espionage Act--excuse me, the
17 Counterintelligence Act set up. We briefed that in our filing. That
18 is their charter; they do a government-wide. They receive inputs
19 from different government organizations. What Mr.--what the defense
20 is already referenced and we have produced to the defense are
21 different entities that have submitted their information to NCIX--we
22 have not reviewed any document that belongs to NCIX, period. What we
23 have done is we have gone to the originator, the owner of the

1 information that was submitted to NCIX, the original entities, to
2 request approval to review their material and, if discoverable, turn
3 it over to the defense and that is what the defense has been
4 receiving.

5 Specifically, the ultimate source, Your Honor, of these
6 documents is not NCIX. The source of the documents that the defense
7 has received in discovery are the actual agencies. So, it was
8 mentioned earlier on the record, today, the Department of Agriculture
9 or the--or any of the executive departments the defense has received,
10 those organizations independently did their own and submitted those.
11 We encounter those agencies for efficiency purposes, we have acquired
12 the documents or were attempting to finalize acquiring all the
13 documents, and then once we obtain them, we'll review them, get
14 approval to turn them over if they're discoverable, and then give
15 them to the defense immediately once we get that approval.

16 MJ: Why did you tell me back on the 21st of March that this--
17 that NCIX--or ONCIX had no damage assessment? Those weren't the
18 exact words you used, but let me----

19 TC[MAJ FEIN]: Correct, Your Honor. Your Honor, frankly,
20 because we do not have access or even knowledge--absent us asking a
21 question and receiving it--to these files because of the nature of
22 this type of assessment, we asked the questions based off of the
23 defense's discovery requests. Specifically, Your Honor--if it may

1 please the Court--kind of lay out a timeline. This is somewhat
2 reflected in the defense's motion from Saturday, but 16 February 2012
3 was the defense's motion to compel discovery, their first motion. On
4 28 February 2012, this first 802 teleconference--after the 16
5 February 2012 motion to compel, we approached, at some point--I don't
6 have that date--NCIX through ODNI and said, "We're required to
7 produce the following, here is an example of what it is, what do you
8 have?" And then the response, of course, given was the Department
9 of--ONCIX has not completed a damage assessment. To date, they have
10 not produced any interim or final damage assessment on this matter.
11 That is what they gave us and told us.

12 MJ: Did they do that orally or in writing?

13 TC[MAJ FEIN]: Orally, Your Honor. And so, by us writing that
14 down and inquiring, "Is this all you have? Is this what it is?" And
15 this is the response we received--that is ultimately what we--fast
16 forward at the motions hearing on the record, both on the 802
17 conference after the motions hearing and on the email in court on 21
18 March, when asked--as you will notice from the Court's Motion to
19 Compel Discovery, dated 23 March 2012, the Court documented the email
20 questions and those email questions were: "Does the damage
21 assessment, essentially, exist with ODNI--or, excuse me, ONCIX," and
22 we responded on an email, "ONCIX has not produced any interim or
23 final damage assessments in the matter." We asked them the question,

1 we don't have any other access to their files, they answered it. So,
2 at that point, we relayed to the Court, we relayed it to the defense,
3 the Court ruled. Then----

4 MJ: At that time, was it the government's belief that they
5 didn't have anything?

6 TC[MAJ FEIN]: Correct, Your Honor. It was our belief, at that
7 point, that they were compiling these other assessments we knew about
8 because we started reaching out once they told us about it to go get
9 those, but that they had no other documentation that would be subject
10 to discovery, based off this response. So, yes, we did know that
11 their individual organizations were submitting theirs and that's why
12 we went out to those independent organizations to get them approval
13 and disclose them.

14 MJ: Major Fein, you know that we're still on the purpose of
15 the--the questions from the Court was to discover what's out there?

16 TC[MAJ FEIN]: Yes, Your Honor, and the prosecution did exactly
17 that, Your Honor. Even after the email from the Court, the
18 prosecution reached out to ODNI and NCIX to ask the question again
19 and this is the response we received. And it goes back to the
20 military authorities line of inquiry. A military prosecutor--even a
21 Department of Justice prosecutor doesn't necessarily have access to
22 walk into any government building and search the files. We ask the
23 questions, we give them the relevant cases--case law--we show them

1 the discovery requests and any other orders, and then they give us
2 the answer or give us access and we go search for the answer. In
3 this case, they gave us the answer, we relayed that to the Court.

4 MJ: But you knew that other entities, if they request, were
5 submitting documents to them?

6 TC[MAJ FEIN]: Yes, Your Honor, and we went after those
7 documents.

8 MJ: Did you ask any follow-on questions like, "Why are you
9 collecting these documents?"

10 TC[MAJ FEIN]: Yes, Your Honor, we did and we were told that
11 they were compiling the documents to do a damage assessment. We
12 asked, "What's the state of the damage assessment so we can relay it
13 to the Court," and this was the exact wording we were given. And so,
14 going forward, Your Honor, after that ruling and after we re-
15 litigated the Department of State, then we sent that and said,
16 "Listen," essentially, as we outlined in our memo to ODNI on behalf
17 of NCIX and then their response back. On 11 May, the Court ruled
18 that even a draft damage assessment from the Department of State is
19 discoverable in that form. We re-litigated that--"does this
20 information apply to your all, based off of what you have previously
21 told us?" And at that point, they said we need to have a meeting, we
22 had the meeting within a week, and then within a week we figured out
23 the way forward as the prosecution submitted their request and, as

1 you can tell from the memos, notified the Court and defense
2 immediately. If we had access, we could review the files, look at
3 them, and go from there.

4 MJ: You mean now or then?

5 TC[MAJ FEIN]: Both. Today, we still don't have access, Your
6 Honor, although we're being given access pursuant to the memos we've
7 received. But then, if we had access, we could have inspected the
8 files and made a first-hand account to the Court.

9 MJ: All right. I think--Defense, anything else? I know you
10 set forth in your original discussion----

11 CDC[MR.COOMBS]: Just one request, ma'am. With regards to what
12 the government--their presenting as far as their question that
13 they've asked and the answer they responded and what they conveyed to
14 the Court, it's clear they never conveyed that ONCIX was collecting
15 something then putting something together or would have said, "Submit
16 whatever you've got." But take a look at page four of the damage
17 assessment that the defense has recently been provided from the
18 Department of State. Look at the middle of page four and you will
19 clearly see why the government cannot say what they've just said.
20 They were on notice that ONCIX was creating a damage assessment. So,
21 not only look at that page, but also look at the date of the
22 Department of State's damage assessment and that will clearly tell
23 the Court what information the government should have been aware of

1 because, at the end of the day, it's the government asking itself
2 what does it have.

3 MJ: Well, Mr. Coombs, the government--even your federal cases
4 don't say that the one entity has knowledge of the entire
5 government's files.

6 CDC[MR.COOMBS]: No, and I wouldn't say that, but the government
7 is asking itself this information. So, unless they were cryptic with
8 Major Fein to where--again, the follow-up question you asked, like,
9 "Why are you collecting this if you're not doing something with it?"
10 "Well, we're putting together a damage assessment." Well, maybe that
11 would have been a good piece of information for Major Fein to share
12 with the Court that ONCIX is putting together a damage assessment.
13 They don't believe that they have it, right now, in a particular
14 format that's finalized or interim or whatever, but at least to share
15 with the Court that ONCIX is, in fact, putting together a damage
16 assessment. When you look at the reference data the defense is
17 asking you to look at, you'll see why they should've been--why you
18 can put that notice at their doorstep.

19 MJ: All right. Major Fein, when did you first have access to
20 the Department of State damage assessment?

21 TC[MAJ FEIN]: Your Honor, we received access to the Department
22 of State damage assessment within, I think, it was a day or two of
23 giving it to the Court prior to the last--prior to the

1 reconsideration motion. We'll have to get you the exact date, Your
2 Honor. I'll have that at my fingertips--we'll look at page four--but
3 the government hasn't ever maintained that we didn't know they
4 weren't doing a damage assessment; that is their entire purpose--
5 NCIX's. We inquired into what documentation they had that we could
6 report on whether they have a draft damage assessment and the--
7 reported back, again. To date, ONCIX has not produced any interim or
8 final damage assessment in this matter when we asked them the
9 question. So, the government's position isn't that we didn't know
10 that they weren't in the process of creating a damage assessment, but
11 we were unaware that they had any other documentation created that
12 would even qualify as a draft. Once we received the Court's order on
13 11 May, we had them re-look and reassess and that's when we started
14 this process.

15 MJ: So the government's position, as I'm understanding it,
16 there, is you saw a distinction between the Department of State--
17 which you told me Department of State has not completed a damage
18 assessment--and--I guess--what's the difference between with the
19 Department of State's position was at that time and what ONCIX was at
20 that time?

21 TC[MAJ FEIN]: Your Honor, to be honest, the government doesn't
22 necessarily know. We asked the question, this is what we're given,
23 who relayed it to the Court. To us, there is a difference between a

1 draft and interim. A draft is an ongoing document and interim is
2 something that is produced as a snapshot in time to memorialized
3 information. So, we did have discussions with both entities on what
4 the differences could be, but, at the end of the day, we asked, "Do
5 you have any documentation or do you have a damage assessment and, if
6 not, what do you have?" And these were the responses we were given
7 and that we relayed to the Court. So, again, it's--we've never
8 maintained we didn't know they weren't doing one. In fact, I think
9 it was publicly announced in Mr.--and the defense has notified the
10 Court of that when the very first filings--that it was publicly
11 announced that they were doing one, but to the extent of what they
12 did, the prosecution had no clue, we had to rely on what they were
13 told--or what we were told. And then we remedied it the moment we
14 realized that--we attempted to remedy it once we realized and asked
15 them to reassess their position based on the Court's order on 11 May,
16 but they had to come back to us and say, "Yes, what we read actually
17 means we have something like that, not what necessarily we told you
18 before." Of course, everything is changing as time goes on. Once
19 they told us, we then went through the procedures and we're here,
20 today.

21 MJ: All right. Anything else with respect to ONCIX?

22 TC[MAJ FEIN]: No, Your Honor.

1 CDC[MR.COOMBS]: Your Honor, just to ask you to review the memo
2 from Major Fein to ONCIX that doesn't entirely coincide with what he-
3 -the explanation----

4 MJ: What memo are you talking about?

5 CDC[MR.COOMBS]: ----he just gave you. The memorandum dated 24
6 May 2012; it's part of the prosecution's notice on the NCIX damage
7 assessment. And reading that memorandum, it's clear that Major Fein
8 is basically making the determination that, based upon the Court's
9 ruling, we now need to disclose that ONCIX has a damage assessment.
10 And this is in response to the Court's 11 May determination that
11 draft damage assessments are not speculative and, by their very
12 nature, are still subject to discovery. So, when you look at that--
13 in that memorandum, it's the prosecution, at that point--and let's
14 even, for argument's sake, say they found out--I don't know--maybe a
15 week before this or whatnot that this--ONCIX had something, they
16 still sat on this for three weeks without even notifying the Court of
17 anything about the presence of a ONCIX's damage assessment. But when
18 you look at the tenor of this email, it's basically, "Based upon the
19 Court's ruling on 11 May, now we need to come clean on ONCIX and we
20 need you to start reviewing it." They write back saying, "Okay.
21 Yeah, we'll have this done by 3 July" and Major Fein and ONCIX make
22 the determination that 3 August is fine day to produce this.
23 MJ: Well, isn't that the day on the Court calendar?

1 CDC[MR.COOMBS]: It may be, ma'am, but that's on the Court
2 calendar for information that the Court was aware of. It wasn't for
3 the damage assessment from ONCIX. So, this was--the Court made that
4 ruling based upon information that the Court was aware of from the 23
5 March determination. So, at this point, what the government's
6 obligation should have been was to immediately alert the Court and
7 the defense that, "You know what? Even though our wording was that
8 they hadn't done an interim or draft damage assessment, there is a
9 damage assessment," and alert the Court to that and then the Court
10 could make the determination as to the date and time that that needs
11 to be produced.

12 But this seems to, again, be kind of a play on the words.
13 I mean, you have to ask the exact right question in order to get a
14 response and it's clear what the Court was asking for when it made
15 its questions on 21 March. And so, the answer--and an up-front
16 answer, especially when the government, now, is saying that they
17 always knew there was a damage assessment on-going, would be to tell
18 the Court that fact--to say, "There is a damage assessment that's on-
19 going and we believe that it's not quite an interim or it's not quite
20 a completed damage assessment or it's not quite this, but to tell you
21 that and then you could make the determination back in March, when
22 you were considering the Department of State, what needed to be done,
23 not to where we're now becoming aware of it, here, and that the very

1 early--at the very latest, I guess, under the government's schedule,
2 would be 3 August. At the very earliest, it may be whenever the
3 Court----

4 MJ: Well, Mr. Coombs, considering the fact that the--I'm just
5 looking at this from a court efficiency perspective. I don't see any
6 point in examining a draft damage assessment when there's going to be
7 a complete one in the beginning of July.

8 CDC[MR.COOMBS]: But--see, that whole analysis of knowing that
9 there was a draft one should have been told to the Court at that
10 time. And then, if we found out that there was a draft one and that
11 they were actually going to complete it in July, well, okay, we can
12 look at the draft and then we can look at the completed one because
13 it may be that the completed one is just a matter of, you know,
14 checking the i's and the t's as opposed to actual substantive
15 changes, but they weren't because we would have been aware of it at
16 that time and then could have dealt with it appropriately. At this
17 point, again, that pushes the can further down the road. I mean, we
18 should have been dealing with this early on.

19 MJ: I understand your point.

20 TC[MAJ FEIN]: Your Honor, if I--I clarify exactly what I just
21 said and more importantly what the defense has conveniently not
22 referenced in the motion, itself. They are referencing the letter
23 that was sent to ODNI from the prosecution team, signed by me. But,

1 in the filing and what I just proffered to the Court--the filing,
2 itself, if you reference paragraph two--I'll read it for the record.
3 It says, "On 11 May, the Court held the Department of State's draft
4 damage assessment was subject to the Court's previous ruling, see
5 Appellate Exhibit" so on and so forth. "In response, the prosecution
6 shared that ruling with ODNI and subsequently met with their
7 attorneys on 17 May 2012." Within 6 days, assuring we met with them
8 in a meeting to discuss the issue of draft documents. During that
9 meeting, ODNI notified the prosecution, on 17 May, that NCIX had
10 compiled a draft damage assessment which is likely similar to the
11 form--to the DoS assessment and thus would have fallen under the 11
12 May ruling. It was from that meeting on 17 May that the prosecution
13 did go back to our offices, we met at the exact same--at first,
14 there's a weekend, there--18 May was a filing date, a weekend, and
15 then the next part of the week we figured out the best way forward to
16 notify the Court and figure out what's going on with ODNI. We, then,
17 submitted a letter to ODNI, they responded, we notified the Court.
18 That is what we outlined in the written motion, that's what I
19 described earlier. That's the first point, Your Honor.

20 The second point is we even recognized in our letter to
21 ODNI that this is, of course, up to the military judge. Although we
22 said we either recommend or anticipate--it's in our letter--3 August--
23 --or we ask you to have it ready by 3 August, based off the Court's

1 calendar, in the very--on page two, at the very last paragraph, we
2 even state, to put them on notice, "As always, the information
3 requirements stated above are subject to change based off future
4 court rulings and orders." So, we even put them on notice, based off
5 of us notifying the Court and defense, that, if the Court was to rule
6 sooner than 3 August, then they're going to need to respond--or we're
7 going to need to respond based off of their input.

8 And then the final point, Your Honor, and this is only for
9 a point of clarification, is that in the letter from ODNI, they said
10 that they anticipated having it done by July--the final by July 13,
11 but, if not, then the most recent one that went out for comment will
12 be made available to make the 3 August deadline. So, they are
13 endeavoring to have it completed before that review, but if they
14 don't they'll make it available by then or whatever date the Court
15 says.

16 CDC[MR.COOMBS]: Now, again, based upon Major Fein's
17 representation, it appears he is saying that 17 May is the first time
18 the government became aware of anything from ONCIX. Previously, he
19 stated that they knew that that was the mission of ONCIX and that's--
20 they knew that they were always creating a damage assessment. So, I
21 don't know which one that is--whether they always knew that, or they
22 just found that out on 17 May. If that fact were true--the 17 May
23 revelation were true, then you would expect to see that, somewhere

1 within the 24 May memo to ONCIX saying, "Hey, we just found out you
2 got a draft damage assessment. We need to take a look at that." 17
3 May is never referenced there. So, again, this goes back to candor
4 to the Court. If Major Fein is saying that they were always aware
5 that ONCIX was creating a damage assessment, they should've told that
6 the Court. If they're saying, now, that they only first became aware
7 of that on 17 May, then that's inconsistent with his previous
8 statements and it's also inconsistent with the 24 May memorandum
9 written to ONCIX.

10 MJ: All right. Well, I think I understand what happened on
11 both sides. I do have a concern--the question that I asked back on
12 the 21st of March was, "Who had a damage assessment?" And,
13 Government, from what I'm hearing from you is you took exactly what
14 they told you and told me?

15 TC[MAJ FEIN]: That is correct, Your Honor.

16 MJ: But you did know if the other agencies were submitting
17 documents to ONCIX and that they had a mission to do that damage
18 assessment?

19 TC[MAJ FEIN]: Yes, Your Honor, and we were working, also, to
20 obtain those other ones.

21 MJ: I guess I'm wondering why didn't you tell me that when I
22 asked you the question on the 21st?

1 TC[MAJ FEIN]: Well, ma'am, our interpretation--your question
2 was based off the defense's discovery request, so it was based off
3 those entities they were requesting. If we were to share with the
4 defense every piece of information we have, I'm drawing the line
5 between answering a question of the Court and with the defense, then,
6 again, it goes to a fishing expedition. They could just ask an open-
7 ended question and force the Court to have us--so we answer the
8 questions the Court asks and we answer with what we have approval to
9 answer based off of security, based off of other concerns and what we
10 have access to.

11 MJ: All right. Let's move on to DIA.

12 TC[MAJ FEIN]: Ma'am, the Defense Intelligence Agency is within
13 military authorities and the government maintains, and has since the
14 first request from the defense, that they have not provided an
15 adequate basis for a legal basis--or adequate factual basis for the
16 request. This really gets down to the where the starting points is,
17 the specific request.

18 MJ: What files have they asked for?

19 TC[MAJ FEIN]: Your Honor, they have asked for--can we have a
20 moment, Your Honor? Well, there's been multiple requests, Your
21 Honor, so the most recent in the motion to compel discovery's full
22 investigative files related to PFC Manning, WikiLeaks, or the damage
23 occasioned by the alleged leaks to be produced. There are no

1 investigative files. We said that on the record last time, the Court
2 asked us over email--or, excuse me, through the Court's order, 23
3 March, we disclosed that; there are no investigative files.

4 MJ: Are there any other files that the government's aware of?

5 TC[MAJ FEIN]: Yes, Your Honor, there are documents that exist
6 within the Defense Intelligence Agency that relate to WikiLeaks?

7 MJ: WikiLeaks or PFC Manning or both?

8 TC[MAJ FEIN]: It's possible both, ma'am, more than likely it's
9 just WikiLeaks.

10 MJ: It's possible both? Are you----

11 TC[MAJ FEIN]: Your Honor, we have started, also--we started a
12 while back and we continue to review those documents. So, it is
13 possible, but we have not found any direct references that relate to
14 Private First Class Manning to WikiLeaks. And Defense Intelligence
15 Agency was the agency proponent of the information review task force.
16 So, the issue, here, the government contends, Your Honor, is it's
17 been a broad request for everything, what type of--what specific
18 information from DIA is the defense requesting? We'll go out and
19 look at that. We're reviewing it as a closely aligned organization
20 for Brady material under 701(a)(6) and, if the defense can articulate
21 a very specific request for specific information from them, then we
22 will----

1 MJ: But how are they going to do that when they don't know
2 what's there?

3 TC[MAJ FEIN]: Well, Your Honor, then, it goes back to it's a
4 mere fishing expedition. "I want everything from a government
5 organization within DoD. I want everything in the command's files.
6 I want a--it should be a very specific request and cases support
7 that, ma'am.

8 MJ: Well, what type--I guess--can you tell me what kind of
9 files that they have that you're reviewing for *Brady*?

10 TC[MAJ FEIN]: Yes, Your Honor, it would range from internal
11 memoranda, product papers--this is an analytic organization, so it
12 would be product papers, briefings, notification-type memoranda--
13 that's probably a good cross-section, Your Honor.

14 MJ: No investigations, no---

15 TC[MAJ FEIN]: They--for purposes of WikiLeaks and Private First
16 Class Manning, they do not have any investigative files. We sought
17 that response, they queried it, they came back.

18 MJ: Okay. And what kind of access have you had, with respect
19 to their files?

20 TC[MAJ FEIN]: When it comes to the information review task
21 force, Your Honor, we have been given access to review it for *Brady*
22 material as well.

1 MJ: All right. And that's the file I just ordered released,
2 right?

3 TC[MAJ FEIN]: That is the impact statement or assessment, Your
4 Honor; that is the culminating document of the life of that
5 organization that was stood up as task force. That was the final
6 product, their conclusions, that's what you reviewed.

7 MJ: Okay.

8 TC[MAJ FEIN]: So, it would be any other product they produced
9 prior to that final product.

10 MJ: Okay. And are you calling in any witnesses from this
11 organization?

12 TC[MAJ FEIN]: Yes, we are, Your Honor.

13 MJ: On the merits, sentencing, rebuttal?

14 TC[MAJ FEIN]: Both, Your Honor.

15 MJ: And what are they going to be relying on for their
16 testimony? Anything--any of these documents we're talking about?

17 TC[MAJ FEIN]: For sentencing purposes, yes, Your Honor. I--
18 well, Your Honor, at least of the assessment you've reviewed.

19 MJ: Okay.

20 TC[MAJ FEIN]: And, again, that's for sentencing, not on the
21 merits.

22 MJ: All right. Anything else from the defense?

1 CDC[MR.COOMBS]: The only thing on that, ma'am, is, obviously,
2 it's within their possession, custody, and control and what the
3 defense is aware of is that DIA was, basically, tasked to stand up
4 the Information Review Task Force in order to do a comprehensive
5 review of all of the information that was alleged to have been leaked
6 in this case. And so that was the information that the defense was
7 aware of and that's the only way we could ask for it. Again, because
8 it's within the military's custody, possession, and control, then, at
9 that point, the government has an obligation to go look. So, if
10 they're saying that the only thing that is there is the Information
11 Review Task Force, that's one thing, but if DIA has done other things
12 that we're not aware of just because that's not been made public,
13 then this is the only way the defense can be made aware of it; by
14 asking for it in discovery.

15 MJ: Okay. So, when you're doing these reviews, then, are you
16 looking at these reviews for both 701(a)(6) and 701(a)(2)?

17 TC[MAJ FEIN]: Ma'am, for DIA information, we have been
18 reviewing it for 701(a)(2), as well, in anticipation if the Court
19 does rule in favor, based off the specific request from the defense,
20 so we do not have to review the documents again.

21 MJ: Okay. Let's go a little bit more broadly, here. When you
22 were reviewing documents for 701(a)(2), if the government is alerted

1 that this could be material to the defense, the government's got an
2 obligation to turn those over.

3 TC[MAJ FEIN]: Your Honor, the government, at least, argues that
4 it's not just that the documents, themselves, are material, it would
5 be certain information the defense--just like the defense is arguing--
6 --or proffered to the Court in their response to the *ex parte* motion
7 to the 505(g)(2). Here are the categories of information--the
8 prosecution makes the initial determination of if it is material to
9 the preparation to the defense and then the defense argues--provides,
10 as they've done, and then it's like, "Okay, that's now what we're on
11 notice of." So, we're absolutely on notice that any type of damage
12 that resulted, for instance, is material to the preparation of the
13 defense, based off of the year and a half of requests. So, as each
14 discovery request comes in, we process it, we add it to our databank
15 of what we're reviewing, and we start, again, churning the review of
16 these documents. But we've maintained, still, based, off today's
17 litigation that those documents still are not 701(a)(2), subject to
18 the Court's order, but, because we do not have a specific request,
19 it's all documents at DIA with some caveats; not any types, not
20 anything directed a certain type of information. I mean the defense
21 is--the defense is in the best position of anyone to know exactly
22 what was or wasn't compromised from their client. They could be
23 making specific requests of what type of information they're looking

1 for. So, it's not that the defense is in the odd position of not
2 being aware of what could be out there--and as the defense just
3 stated on the record--as--if the Information Review Task Force--which
4 it was--was started to review all the possible compromised documents,
5 then they should know what was compromised, we would know, from
6 reviewing the files, what's there, and they can make specific
7 requests. But it goes back to--it's a generic request copied and
8 pasted from 701(a)(2) for pretty much every type of document out
9 there.

10 MJ: What volume of information are we talking about?

11 TC[MAJ FEIN]: Your Honor, if--we have probably--keep going--
12 I'll be able to get you that information before we close the Court
13 today.

14 MJ: All right. Yes?

15 CDC[MR.COOMBS]: The attachments to our initial Motion to Compel
16 Discovery Number 1 give the Court every one of our discovery motions.
17 Our motions are not cut and pasted from--or our requests are not cut
18 and pasted from the manual. We made specific requests when we had
19 information, but, here, it's--701(a)(2) just requires us to make the
20 request for documents that are within the government's possession,
21 custody, or control. It's the government, at that point, that has
22 the obligation to look at the documents in their possession and turn
23 over anything that's material to the preparation of the defense.

1 Major Fein seems to read in an additional requirement for
2 us to, then, indicate what documents we haven't seen yet--how those
3 documents may be material to the preparation of the defense. That's
4 not within 701(a)(2), that's not a requirement of 701(a)(2). And,
5 again, unless I'm not hearing Major Fein correctly, it sounds like
6 they've done a search of 701(a)(2) and have, potentially, information
7 that's material to the preparation of the defense, but they're not
8 turning it over because they haven't received a specific request
9 unless the Court orders them to do so. And if that's the case, they
10 need to just turn that stuff over right now, if they have, in fact,
11 identified stuff.

12 TC[MAJ FEIN]: Your Honor, if the Court is willing to accept the
13 defense's argument, then that means any document that is in the
14 possession, custody, or control of military authorities, that they
15 simply request and make no other showing, then they are entitled to
16 inspect. Your Honor, especially dealing with classified information,
17 it goes back to that this is a tactic in order to, essentially, slow
18 this prosecution down--slow this court-martial down--when one hand--
19 arguing that, for instance, an upcoming *Brady* motion, we've given too
20 much information about identified stuff, now they want everything,
21 just because they've made a request. We've maintained--the
22 prosecution has maintained, from the very first request, provide us a
23 specific request, provide us an adequate basis and a specific factual

1 basis and we will be able to process it. All documents from DIA or
2 the IRTF is not sufficient. Yes, we have prepared if we do want to
3 move this case and we do not want to have unneeded delay in order to
4 do this and I have to review thousands of pages of documents again.
5 But, again, these are classified documents and the defense knows that
6 and yet they still can maintain these general requests--just because
7 they make the request, then it must be material to the preparation of
8 the defense with no other showing.

9 MJ: I understand that, Major Fein, but when the government is
10 reviewing these documents, the government has a burden--has an
11 obligation under R.C.M. 701(a)(2) to disclose material to the
12 preparation of the defense. So, if the government, while observing--
13 while looking through these documents sees something that you think
14 is material to the preparation of the defense and you're not turning
15 it over because they didn't ask for it, I'm going to order everything
16 turned over to me for *in camera* review.

17 TC[MAJ FEIN]: Yes, ma'am.

18 MJ: So, is the government going to look at this with an eye of
19 a defense counsel and---

20 TC[MAJ FEIN]: We absolutely will, ma'am, and to turn over just
21 material based off of what the defense gives us and what they
22 consider material to the preparation of a defense, we will review the

1 documents before that because then that would qualify as a specific
2 request and we would do it.

3 MJ: We're having a circular argument here, again. If you're
4 looking at a document and you say, as Major Fein, "Boy, if I was a
5 defense counsel, I would find this material to the preparation of the
6 defense," are you going to hold onto it until they request it?

7 TC[MAJ FEIN]: No, Your Honor, we're not.

8 MJ: Okay.

9 CDC[MR.COOMBS]: Okay, well, that seems to be, finally, the
10 correct answer because, even within the analysis, it indicates that
11 if the trial counsel sees something that is clearly material to the
12 preparation of the defense. Even without a request from the defense,
13 the discussion says you should turn it over. And now that we've
14 actually identified their organization and said, "Give us stuff
15 that's material to the preparation of the defense," again, he has an
16 obligation to hand it over. If I didn't understand him correctly--
17 he's free to correct me--but I believe he said, "We have
18 documentation that we've identified that's material to the
19 preparation of the defense and we're prepared, if the Court orders
20 us, to hand it over and hand it over, but until we receive a specific
21 request, we're not doing so." And now, based upon the Court's
22 exchange with Major Fein, he now realizes, "Okay, yeah, we need to
23 turn this over," then that's the clarification that the defense would

1 want to nail down. Does he have documents, right now, that are
2 material to the preparation of the defense that he's been holding
3 onto because he believed we needed to make a specific request for it?

4 MJ: I'll ask you that question, then.

5 TC[MAJ FEIN]: Yes, Your Honor, I'd ask if we could get back to
6 the Court because we--I literally have to go look at the computer
7 system, but we'll be able to answer the Court.

8 MJ: Okay. All right, moving on. DISA?

9 TC[MAJ FEIN]: Your Honor, the Defense Information Systems
10 Agency is a Department of Defense entity. It is within the
11 possession, custody--their--any documents they have--we have
12 submitted a request to review their documents and we're in the
13 process of reviewing them. That should be, probably, completed very
14 shortly; there's very few documents.

15 MJ: So, a few documents?

16 TC[MAJ FEIN]: It's--I think it's--this, I think is under 60
17 total documents, Your Honor.

18 MJ: Okay. Do you have any idea what kind of documents?

19 TC[MAJ FEIN]: Most of it, Your Honor, is going to be
20 administrative documents, possibly background documents dealing with
21 information that we've turned over to the defense that we intend to
22 use on the case-in-chief.

23 MJ: Okay. So, you've already turned in--over----

1 TC[MAJ FEIN]: The evidence.

2 MJ: ----from this entity----

3 TC[MAJ FEIN]: Yes, Your Honor.

4 MJ: ----and do you have witnesses that you're going to be

5 calling from this entity?

6 TC[MAJ FEIN]: Yes, Your Honor.

7 MJ: And whatever they're going to be relying on has been turned

8 over to the defense?

9 TC[MAJ FEIN]: If they're qualified as an expert, then yes, Your

10 Honor. Meaning, if they're more than a fact witness.

11 MJ: Okay. So, whatever documents they're going to be relying

12 on will have been turned over to the defense?

13 TC[MAJ FEIN]: Yes, Your Honor, the evidence has already been

14 turned over to the defense.

15 CDC[MR.COOMBS]: And, then, this is another--just a point of

16 clarification, then, based upon what Major Fein said--he indicated

17 they're in the process of still reviewing certain documentation. So-

18 -and then he said everything has been turned over to the defense.

19 So, there is an internal disconnect there. Additionally, we've been

20 asking for this information for an extended period of time, so if

21 they're still in the process of reviewing information, then that goes

22 back to the due diligence request of the defense.

23 MJ: That we'll be litigating next time.

1 CDC[MR.COOMBS]: Correct. So, the first area, here, is: are
2 there documents that they're in the process of reviewing that they
3 have not turned over to defense? Because it seems like the second
4 statement he made was, "We've turned everything over to the defense.

5 TC[MAJ FEIN]: Your Honor, all the evidence we intend to use at
6 trial, we've turned over to the defense. They've been in possession
7 of the evidence we intend to use at trial.

8 MJ: So, what you're looking at is something----

9 TC[MAJ FEIN]: The only unnamed documents we have to review are
10 from the same request we submitted to all the other entities we've
11 talked about and that comes to about, I think, 60 total documents
12 that we just need to review

13 MJ: Okay.

14 CDC[MR.COOMBS]: So that's *Brady* information or material to the
15 defense-type information that they're reviewing or what are they
16 reviewing?

17 MJ: Well, I think--and, Government, I'll put this--and you're
18 reviewing these military entities--you're certainly viewing with an
19 eye towards, if you find something material to the preparation of the
20 defense----

21 TC[MAJ FEIN]: Yes, Your Honor, because it's a military
22 authority. We still maintain, again, Your Honor, the specific
23 request even for the DISA. If this is a never-ending--we--Your

1 Honor, not to re-litigate the circular argument--for this, yes, but
2 what precedent this is setting is now the defense can and will be
3 able to list every Department of Defense entity and just lob it to
4 the wall and say, "Now, we require them to look at these documents."

5 MJ: I'm saying--is--right now, you have specific entities that
6 you have----

7 TC[MAJ FEIN]: Yes, Your Honor, we'll continue what we're doing--
8 ---

9 MJ: ----identified documents to look at?

10 TC[MAJ FEIN]: Yes, Your Honor.

11 MJ: When you look at those documents, if you see a document
12 that is material to the preparation of the defense--that you believe
13 that, having looked at it, even if you don't have a specific request
14 for that piece of information, disclose it.

15 TC[MAJ FEIN]: Yes, Your Honor. I guess--and the government is
16 not contesting what you're directing; that will happen. The
17 unfortunate effect of that is, right after this--today's motions
18 hearing, the defense can now request every DoD entity--document and
19 that, somehow, would create a burden on the government to have to
20 review it all?

21 MJ: No, there are reasonableness and overreaching issues
22 involved in that that the Court will certainly address if presented
23 with anything like that.

1 TC[MAJ FEIN]: Okay, Your Honor, because that--I mean--that's
2 what--I think this is what was lost, here, is that's what we've
3 intended by focusing on the specific request, for instance, the IRTF
4 and DIA documents. The reason we rely on the specific requests line
5 of litigation is this broad request is unreasonable. It is simply
6 saying, "I want you to look at everything and then you haven't done
7 it fast enough and now I'm going to, essentially, say that that
8 somehow affects the accused's right to a fair trial." But, if the
9 defense can keep making broad requests, the government is going to be
10 required to keep reviewing these. I mean, even at this point,
11 449,000 pages have been produced in discovery which means the
12 prosecution has reviewed, at a minimum, 449,000 pages. So, if you
13 just--it's simple math that if this is a great tactic for the
14 defense--and, plus, Your Honor, when it's all classified and they
15 know this, it ends up being a graymail issue because they simply are
16 making a request--a broad request for every document and it binds us
17 to have to look for it and then turn it over if it's material to the
18 preparation of the defense simply because they ask for it. Without
19 any reason--they've articulated no reason for the DISA documents and
20 that's what we're currently talking about; none.

21 MJ: If there's no reason, then why are you examining them?

22 TC[MAJ FEIN]: Your Honor, because it goes back to--the defense
23 seems to be using our--the prosecution's willingness to disclose to

1 the Court and the defense, those organizations we consider closely
2 aligned for *Williams* purposes. They're listing those that now say,
3 "I want to use those organizations for 701(a)(2) purposes." That's
4 where this request first came in. So, if you look at the timing, the
5 prosecution discloses to the Court for *Williams* purposes--we're doing
6 our ethical--we're following our ethical obligations and *Williams*
7 obligations to search records for *Brady* material. The defense uses
8 that information to say, "Now, I want that information under
9 701(a)(2)." So, again, this will become a vicious circle and we
10 don't know where the end is. Because, I guess, as long as the
11 defense is knowingly--knowing the outcome of this, that's going to be
12 fine because that means that the prosecution is going to have to
13 start reviewing all these documents under 701(a)(2) and if we find--
14 simply per a request, tipped off by us, and if that happens, then we
15 have to review them, get the approvals to turn them over, and start
16 this entire 505 process, assuming it's got----

17 MJ: Okay. And that's how classified litigation works.

18 TC[MAJ FEIN]: Yes, Your Honor, but see, the point is that they
19 don't have any independent basis for this. The defense has
20 articulated none to the Court. They are basing it off of our
21 *Williams*-defined closely aligned organizations and that's their sole
22 basis. We don't agree on that part for DIA, Your Honor, because the
23 defense has known about the IRTF, independently, based off of public

1 statements. But, for DISA, next is CENTCOM, next is SOUTHCOM. So,
2 go back to--they have not provided any basis other than "It's a
3 military authority, therefore, I get a look at it."

4 MJ: If it's material to the preparation of the defense.

5 TC[MAJ FEIN]: Yes, Your Honor. Got it, Your Honor.

6 MJ: Okay. Yes?

7 CDC[MR.COOMBS]: Your Honor, again, looking at the attachments
8 to the Motion to Compel Discovery 1, you'll see all of our discovery
9 requests. When the defense alerted the Court, prior to even the
10 arraignment, that we're asking for specific items, we listed those
11 specific items. Major Fein is just mistaken when says that we're
12 somehow relying upon who they're telling us who they believe is
13 closely aligned. Not only that, again, it seems like Major Fein
14 still does not understand that, when it's an entity that's within his
15 possession, custody, and control of the trial counsel, there's no
16 other obligation other than "Give me the documentation that's
17 material to the preparation of the defense." So, again, that seems
18 to be the problem that the government--even though they're now
19 saying, "Yes, we understand," they don't appear to be understanding.
20 The defense has not gone on and named every federal agency. We've
21 named very specific federal agencies based upon the information that
22 we've received. Like it or not, that's how discovery works. We
23 receive information and we follow up on leads; that's what a defense

1 counsel does. And, in this instance, now, we've identified, several
2 times, the same exact agencies of information we're looking for. And
3 it appears to be--right now, the first time the government
4 understanding that, if it's an agency within its military possession,
5 custody, and control, that all that's required is a request for
6 documentation; any report, that's it. And then they have to look and
7 if they see something that's material to the preparation of the
8 defense, they need to turn it over.

9 MJ: Well, I'm not sure I'd go quite that far, oddly, but----

10 CDC[MR.COOMBS]: If it's a named organization and it's material
11 to preparation of the defense, then DIA and CENTCOM and SOUTHCOM--
12 they act like we're, just now figuring out CENTCOM and SOUTHCOM is
13 involved in this. Of course we knew they were involved in this based
14 upon the charged documents. And that's why we asked for any report,
15 damage assessment, any sort of investigation done by that agency.
16 And so, as we name these--and, again, take--we named CID, DIA, DISA,
17 CENTCOM, and SOUTHCOM. The sky is not falling for the government.
18 Those are the agencies we named and we said, "If there are documents
19 that are material to the preparation of the defense in the possession
20 of these agencies, we want them." The government has consistently
21 come back with, "You haven't given us a basis," and they've argued
22 that, here, and the Court has consistent said, "No, if you look at
23 it, as the government, and you say to yourself, 'I really would like

1 to have this if I were defense counsel,' that should tip you off
2 that's material to the preparation of the defense. You need to hand
3 it over."

4 The discussion of the rule says, "Even without a request,
5 if you saw that stuff, you'd have to hand it over." The government's
6 now going down some other radical of us, now, apparently going on an
7 alphabetical list of all the federal agencies. These are the
8 agencies we're aware, these are the agencies we're asking for and
9 it's important for the government to at least acknowledge, at this
10 point, that if it's material to the preparation of the defense, they
11 need to hand it over. There's no additional justification they need
12 other than to hand it over.

13 MJ: All right. Government, just look at--when you're going
14 through these documents, just look at the analysis to R.C.M. 701(a);
15 it sets forth what the drafters intended with that. It says there
16 should be a specific request, if there isn't and you're looking at
17 some documents, the wording is "when obviously discoverable material
18 is in the trial counsel's possession, trial counsel should provide
19 them to the defense without a request."

20 So, where I'm going with this is, if you're looking at the
21 documents anyway and----

22 TC[MAJ FEIN]: Yes, Your Honor.

1 MJ: ----you see something that is obviously material to the
2 preparation and the defense----

3 TC[MAJ FEIN]: Yes, Your Honor, and the government would ask,
4 just so--for these requests, got it, we're looking at them anyways.
5 So, for the subsequent and future requests--even going back to the
6 Court's order on 23 March, Discovery Order, 23 March 2012, you know,
7 the cites to *Graner*--ultimately, discovery rules under M.R.E. 701--
8 excuse me, R.C.M. 701 and evidence production rules under some theory
9 of relevance, materiality; a simple request with no other basis. And
10 that's ultimately what we're arguing by the specific request. We
11 acknowledge we're going to do exactly as directed right now, but for
12 future requests, this isn't necessarily--we would maintain--precedent
13 for this court-martial. If this is all it is, got it, Your Honor.
14 We've already obtained the documents and started reviewing them so
15 we'd have to look at them anyways.

16 MJ: Yes.

17 CDC[MR.COOMBS]: And *Graner*, as you well know, deals with
18 documents outside of the military's possession, custody, and control.

19 MJ: It does, but it links 701 and 703.

20 CDC[MR.COOMBS]: Mistakenly so, yeah, it goes through that whole
21 little process, but the documents that they were trying to get were
22 not within the Department of Defense and so, that was the whole issue
23 there.

1 MJ: Are we going back to that rule that there has to be no
2 relevance for when you're asking for a requested discovery?

3 CDC[MR.COOMBS]: No, ma'am. Again, when you list the agency--as
4 I say, you've got to list the agency and have some basis for why
5 you're asking for that agency and then that triggers the government
6 to take a look at the information and if there's something in there
7 material to the preparation of the defense, they need to hand it
8 over. We've listed agencies, not based upon a whim. If we did, you
9 would be looking at a lot more agencies than just the five that are
10 listed here. We've listed the agencies--and it's clear to anyone
11 looking at this that we've listed those agencies based upon
12 information we've received that these are the agencies that are
13 involved in this case. And so, we're not out on a fishing
14 expedition, as much as the government likes to use that terminology.
15 We've listed agencies that are part of this case and are within the
16 military's possession, custody, and control and they have an
17 obligation, at that point, to turn that information over.

18 So, again, even with the trial counsel's latest statement,
19 it appears that he's, again, trying to read some further obligation
20 to turn over information that's definitely, by any stretch of the
21 imagination, material to the preparation of the defense. There's no
22 obligation for that, as the Court correctly directed the government

1 to the discussion. You see it, and you think it's material, you have
2 to hand it over.

3 MJ: Okay. I think we litigated that to death.

4 TC[MAJ FEIN]: Yes, Your Honor, and I think for the--and the
5 same list, CENTCOM and SOUTHCOM are next and it's the exact same.

6 MJ: Okay. So, CENTCOM and SOUTHCOM, the exact same 701(a)(2)--
7 --

8 TC[MAJ FEIN]: It would be the same as DISA; they are within
9 military authorities.

10 MJ: Closely aligned?

11 TC[MAJ FEIN]: Yes, Your Honor, for *Williams* purposes.

12 MJ: Okay. And your----

13 TC[MAJ FEIN]: When we review those documents for *Brady*
14 material, we'll also be identifying and reviewing them for 701(a)(2),
15 material to the preparation of the defense.

16 MJ: Okay.

17 TC[MAJ FEIN]: And we'll also review what we've already looked
18 at for that too.

19 MJ: All right.

20 CDC[MR.COOMBS]: Just on that, ma'am, is the government saying
21 that they haven't reviewed the documents or they're still on-going
22 and they're reviewing the documents? Have they produced all the
23 documents from CENTCOM and SOUTHCOM they intend to rely upon?

1 MJ: Are CENTCOM and SOUTHCOM--are there documents from those
2 two entities or--just go--let's go one by one--that you've turned
3 over to the defense that are going into your merits or sentencing or
4 rebuttal case?

5 TC[MAJ FEIN]: Ma'am, for--we've turned over the evidence we
6 intend to use at trial, on the merits. We are not aware of any of
7 the files that we have that we still have to review that we intend to
8 use on the merits or for sentencing.

9 MJ: So, the files that you're reviewing now or the same type of
10 files that you're talking about for DISA--I mean for--yeah, for DISA
11 or----

12 TC[MAJ FEIN]: Actually, for DIA, Your Honor.

13 MJ: ----DIA?

14 TC[MAJ FEIN]: DISA was kind of----

15 MJ: That was a smaller one?

16 TC[MAJ FEIN]: Yes, ma'am.

17 MJ: Okay.

18 TC[MAJ FEIN]: Yes, Your Honor. It's, essentially, internal
19 correspondences by memoranda, PowerPoint briefings, OPORDs, general
20 military-type documents; it's two combatant commands.

21 MJ: Just to be clear, Government, I mean, I understand--I'm not
22 saying everything that mentions the word--you know, "Bradley Manning"
23 is turned over to the defense, I'm just saying if you run across--you

1 come across things and say, "Boy, I'd love to have this if I was a
2 defense counsel. I could certainly use it."

3 TC[MAJ FEIN]: Yes, ma'am, it would be actually much easier for
4 us to turn it all over.

5 MJ: All right. The President's Intelligence Advisory Board?

6 TC[MAJ FEIN]: Ma'am, the President's Intelligence Advisory
7 Board--there's actually the three organizations that are grouped in
8 the same area. I think one is the Interagency Committee, the----

9 MJ: Is that the over--okay, that's the House Oversight
10 Committee, the----

11 TC[MAJ FEIN]: House Oversight Committee, Interagency Committee,
12 and the PIAB are--the government's position and general argument is
13 the same for all three. So, if it may please the Court, I will
14 discuss that and then----

15 MJ: That's fine.

16 TC[MAJ FEIN]: ----talk about an exception for the PIAB.

17 MJ: Okay.

18 TC[MAJ FEIN]: The government contends that those three
19 organizations--the defense's request does not, essentially, qualify
20 as a 701(a)(6) *Brady* request. It's essentially--goes to the same
21 line of argument for 701(a)(2); they have not provided any basis on
22 why there could be *Brady* material at these three organizations. They
23 have provided some information about what might exist there, but not

1 had any showing that would put us on notice of what type of *Brady*
2 material. Any type of information that is favorable to the accused
3 and material to their guilt or punishment.

4 MJ: Have you accessed any of these files from any of these
5 entities?

6 TC[MAJ FEIN]: No, Your Honor.

7 MJ: Are you using witnesses from any of these entities in your-
8 ---

9 TC[MAJ FEIN]: No, Your Honor.

10 MJ: ----case-in-chief or sentencing or rebuttal?

11 TC[MAJ FEIN]: No, Your Honor.

12 MJ: Have you given any discovery from any of these entities
13 thus far?

14 TC[MAJ FEIN]: No, Your Honor.

15 MJ: Have you been involved, in any way, with any of these
16 entities?

17 TC[MAJ FEIN]: No, Your Honor.

18 MJ: Okay. Go ahead.

19 TC[MAJ FEIN]: Your Honor, that, essentially, is the end of the
20 common argument among all three of those entities. We have never
21 even communicated with any individual within those entities and we
22 are not on any notice, as the prosecution, of any information that
23 would be *Brady* or could even reasonably be *Brady* that would exist in

1 those organizations, with one exception and that is why we footnoted
2 the PIAB and were not contesting our *Brady* search of the PIAB.
3 Independently, we do have an ethical obligation, at this point, to
4 search the PIAB for other information we received.

5 MJ: Why?

6 TC[MAJ FEIN]: Because, based off meetings we've either been to
7 or documents we've read from other organizations, we do have a good-
8 faith basis that there, potentially, is *Brady* material at the PIAB.
9 So, the reason we have footnoted that in our response and it would
10 otherwise possibly seem confusing is we--the argument for all three
11 is the defense has not given an adequate *Brady* request for 701(a)(6)
12 under *Williams* to bind--to require the government to go search; for
13 the PIAB, we're doing it anyways.

14 MJ: Okay.

15 TC[MAJ FEIN]: Under a different requirement.

16 MJ: All right. Defense?

17 CDC[MR.COOMBS]: Yes, ma'am. Again, the defense would request
18 that the Court take a look at our specific requests which is outlined
19 in our Defense Motion to Compel Discovery, but, at the same time that
20 you look at that, when we put as much detail as we could as to where
21 this information could be found, we named people, we named agencies.
22 The government would add to that requirement some sort of additional
23 specificity that is nowhere required by *Williams*. Unless--if we

1 could somehow predict what information, exactly, is found within
2 these agencies, that's the whole point of the *Brady* requirement under
3 701(a)(6). Take a look at *United States v. Trigueros*.

4 MJ: How do you spell that?

5 CDC[MR.COOMBS]: It's T-R-I-G-U-E-R-O-S---I butchered that last
6 name--69 MJ 604. In that case, ma'am, the Court found the following
7 to be a specific request under *Williams*: copies of any and all
8 records maintained by any healthcare provider to include mental care
9 for any sessions with, either Ms. JLC or Ms. SCR; that was their
10 request. Specificity. Copies of any and all records maintained by
11 any healthcare provider. They didn't even name the healthcare
12 provider. They said, "Any and all records for these two people."
13 And that was enough of a *Brady* request--a specific request to invoke
14 a *Williams* obligation by the defense and that's what the Army Court
15 of Criminal Appeals found.

16 Now, you compare and contrast with what we asked for. "The
17 results of any investigation or review concerning the alleged leaks
18 in this case by Mr. Russell Travers, National Security Staff Senior
19 Advisor for Information Access and Security Policy. Mr. Travers was
20 tasked to lead a comprehensive effort to review the alleged leaks in
21 this case." Comparing those two, if what was found by the Army Court
22 of Criminal Appeals to be a specific request, this is clearly as
23 specific request. The government is----

1 MJ: Looking at your case law that you cited to me----

2 CDC[MR.COOMBS]: Yes, ma'am.

3 MJ: ----if there are federal and state entities involved in

4 certain investigations, the case law that I've read said that the

5 federal entity, unless they're somehow tied to the state entity,

6 doesn't have to go and do a *Williams-Brady* search. The defense

7 argument, to me, is, if the defense just says, "Okay, I want you to

8 search State A, B, C, D, and E's files," you can basically go to any

9 entity you want to.

10 CDC[MR.COOMBS]: No. I mean, I think when you take a look at

11 the Army Court of Criminal Appeals opinion that I cited to you, it

12 indicates that you do have to have a specific request in order to

13 trigger the third prong within 701(a)(6) requirement of the trial

14 counsel. And now, the question becomes what is "specificity"?

15 Enough specificity to require the trial counsel to have the good-

16 faith obligation to go look. By its very nature, these are going to

17 be files outside the possession, custody, and control of the trial

18 counsel. So, when you take a look at what was requested in

19 *Trigueros*, the Court, there, found that was a specific request.

20 Here, there is no doubt that these three requests are specific

21 requests.

22 Again, the nightmare scenarios of the government of us just

23 saying, "Go to this agency, go to that agency," doesn't exist. We've

1 named three specific agencies for very specific reasons: that we had
2 information that these three things--the Interagency Committee
3 Review, the President's Intelligence Advisory Board, and the House of
4 Representatives Oversight Committee--had done some sort of damage
5 assessment or assessment of these leaks. And, at that point, when
6 they were pulling in information, Mr. Travers, apparently, was tasked
7 to lead some comprehensive effort to review all of the alleged leaks.
8 The President's Intelligence Advisory Board, again, was, apparently,
9 tasked to report and make the recommendations concerning the alleged
10 leaks. The House of Representatives Oversight Committee, again, was
11 tasked to take a look at my client--the investigation of my client
12 and, apparently, the alleged leaks. And so, we've named those three
13 things.

14 If you look at 69 MJ 604, that's a specific request and so,
15 now, all that's required is the government has to at least exercise
16 good faith to attempt to go see if there's information; that is their
17 requirement. There is no additional burden that the government now
18 believes somehow has to be satisfied by the defense to say, "Hey,
19 when you go look at that file that I never had an opportunity to see,
20 here are the following *Brady* materials you're going to find because,
21 you know, I pulled out my Magic 8-Ball or whatnot and figured out
22 what's there." There's no way to do that. But, you have to--if you
23 give enough specificity to give the trial counsel the guiding light

1 as to where they need to go look, then they just have to use a good-
2 faith effort to go look and if they go there and they don't find
3 anything, fine. But this is not a fishing expedition, this is not a,
4 "Hey, give--look at any and all agencies within the United States
5 government for files relating to PFC Manning." That would be a good
6 response for the government, then, to say, "That's not specific
7 enough." I'm naming the exact agency and each case I'm naming a
8 point of contact and what they were doing. That's very specific.
9 They should, at least, go look and then report back whether or not
10 any of these three organizations have anything that would qualify as
11 *Brady*.

12 TC[MAJ FEIN]: Your Honor, very quickly----

13 MJ: Yes?

14 TC[MAJ FEIN]: ----just to provide context to the *Trigueros*
15 case. This was a rape victim and her medical records were at issue
16 and it was a general request for all medical records. She took the
17 stand and it was about her credibility and some medical records were
18 produced and not others were reviewed. So, there's context to what
19 ACCA ruled with and, again, the context is we knew the credibility--
20 or the Court knew the credibility was at issue and they said that
21 that more generalized request was specific enough for that issue.
22 Additionally, in *Williams*, CAAF held, at the very end of their
23 decision--so right before the last two lines of the case--so I guess

1 it would be page--excuse me, Your Honor, 50 MJ 443, *Williams*. I
2 quote, "In summary, neither Article 46 nor the *Brady* line of cases
3 requires the prosecution to review records that are not directly
4 related to the investigation of the matter that is the subject of the
5 prosecution, absent a specific defense request identifying the
6 entity, the type of records, and the type of information." And they
7 do footnotes--well, footnote seven--that the issue of when the
8 prosecution properly may ask for a more particularized showing of
9 relevance is a separate matter we may not address. So, the Court
10 even recognizes that this could be an issue; they don't directly
11 address it. The only thing the prosecution is offering to the Court
12 is that, if the defense comes up with a more particularized showing
13 of why *Brady* material will be there, then absolutely, the prosecution
14 will reach out to another entity and go find it. And, absent that,
15 Your Honor, or, of course a court's order, we stand by for those----

16 MJ: All right.

17 TC[MAJ FEIN]: ----two entities because the PIAB we already are
18 reaching out to.

19 MJ: All right. The 17 April 2012 memo?

20 CDC[MR.COOMBS]: Actually, ma'am, before we just go on, just to
21 respond, real briefly to what Major Fein said, apparently, the--well,
22 first of all, *Trigueros* is not as limited as Major Fein would like
23 the Court to believe. It actually looked at the request and said

1 that was sufficient under *Williams*. The other aspect to this is
2 Major Fein has said that we are looking at the PIAB because we're
3 aware that there's some *Brady*. Well, okay, how are they aware that
4 there's some *Brady*? We made the same request. Why is the request
5 under the PIAB somehow sufficient and our other two requests are not?
6 Because they're virtually identical as far as the format. We
7 identified an organization, we identified a person within that
8 organization, and we've indicated what that organization was tasked
9 to do. So, apparently at the PIAB, they've been aware--made aware of
10 *Brady*. How do you do that if you don't go, as the trial counsel, and
11 use your good-faith obligation and contact and find out? If that's
12 how he did it, that's exactly what he needs to do with the other two
13 agencies and if they came back and said, "Hey, we don't have
14 anything," or, "Here's what we have," and they looked at it and said
15 there's no *Brady*, here, well, then there you go. But why is the PIAB
16 somehow any different than the other two agencies we've identified?
17 And why is their request, at least within the PIAB enough to trigger
18 them to look at *Brady*, and the other two are not?

19 TC[MAJ FEIN]: Your Honor, the defense--we maintain the
20 defense's request to look at PIAB is not sufficient. It's an
21 independent obligation we have and it's not from a discussion we've
22 had with the PIAB. It would be much easier if it was that easy
23 because, hopefully, we would have obtained whatever material and done

1 our review. We don't know if there's *Brady*; it's our obligation to
2 search for *Brady*. So, we have a good-faith basis based off of
3 independently learned information that the prosecution has a good-
4 faith basis to go search; it's a search requirement and if there's
5 *Brady*, then it's a disclosure requirement. So, we don't know what
6 they have, but we do know we need to go look.

7 MJ: All right. That's all the entities that I have. Does--are
8 there any more out there other than going to the 17 April 2012 memo?

9 CDC[MR.COOMBS]: No, ma'am, but we were going to talk about the
10 sub-entities for the Department of State, but the government has
11 already indicated that they haven't seen any of that stuff yet. So,
12 we'll talk to the witnesses tomorrow on that, but, no, other than the
13 HQDA memo, there is nothing else.

14 TC[MAJ FEIN]: The government recommends to the Court, if the
15 defense is amenable, that we probably pick up that portion of the
16 litigation after the witness has testified that way if the defense
17 calls these witnesses, they'll be able to get the information they
18 need----

19 MJ: You mean the Department of State piece or the 17 April
20 2012----

21 TC[MAJ FEIN]: I'm sorry, Your Honor----

22 MJ: ----memo?

23 TC[MAJ FEIN]: ----the Department of State witnesses.

1 MJ: Okay. That's fine.

2 TC[MAJ FEIN]: Your Honor, the government maintains that--well,
3 first, the information the defense, we think is----

4 MJ: Let me start there. What are you requesting? I've got the
5 memo attached.

6 CDC[MR.COOMBS]: Yes, ma'am. You take a look at the actual HQDA
7 memo and it lays out exactly what is being requested. And, again,
8 that should be no secret, then, as to what the defense is asking for
9 because, if you take a look at what the memorandum basically requests
10 all the principals to come back with any documents with material
11 pertaining to any type of investigation, working groups, resources
12 provided to aid in rectifying an alleged compromise of government
13 information, damage assessments of the alleged compromise, or the
14 consideration of any remedial measures in response to the alleged
15 activities of PFC Manning and WikiLeaks.

16 MJ: What is the attachment attached to?

17 CDC[MR.COOMBS]: It should be attached, ma'am, to our Motion to
18 Compel Discovery 2--either that or it's attached to our response. It
19 is attached to 2, ma'am. So, Appellate Exhibit 96.

20 MJ: Okay. It's attached to Appellate Exhibit 96? All right.

21 CDC[MR.COOMBS]: So, if you look, ma'am, you'll see a cover
22 memorandum, dated 17 April 2012, that's when HQDA realized nothing
23 had been done on the initial request and it put out a suspense for 23

1 April 2012. The follow-on page is the Army staffing form and it
2 indicates, there, that--you know, key points--the U.S. Army is
3 prosecuting PFC Bradley Manning, the Army prosecutors are requesting
4 the preservation and production of records. We know this is
5 basically their memorandum to--they started sending out. And then it
6 says we were--it was only recently determined that no action had been
7 taken on the request. That was dated 29 July 2011. And so,
8 somebody, apparently, within HQDA clued in that nothing was done and
9 then put out this suspense memorandum to get a response. And then
10 the response was, apparently, to provide an affirmative response to
11 OTJAG.

12 MJ: So you're looking for information that is generated?

13 CDC[MR.COOMBS]: Yeah, because this would then be information
14 we've already requested under 701(a)(2), materials that were within
15 the possession, custody, and control of the Department of Defense
16 with regards to our client. And, in fact, I'd almost venture guess
17 that if the defense had made a discovery request that sounded very
18 similar to this, it would be deemed not specific enough, but that's
19 what we're asking for; any documents material to any type of
20 investigation, working group, or any effort to rectify any of the
21 alleged compromise, any damage assessment, any consideration of
22 remedial measures. So, not only is that what we're asking for--so
23 that's what we desire when the government says we don't understand

1 what they desire, but then when you take a look as to why this would
2 be relevant, it's self evident why this would be relevant from that
3 point. It's why it would not only fall under 701(a)(2), but, more
4 than likely, if there is anything in here that indicates there wasn't
5 damage or, if not, it could also be 701(a)(6), *Brady* material.

6 MJ: I noticed the memorandum has a suspense date of the 23rd of
7 April 2012. So, have the entities who've gotten the memo reported
8 back?

9 TC[MAJ FEIN]: No, Your Honor, Headquarters DA Staff did not
10 meet this suspense. We have received--at this point, we received all
11 of the documents that were pursuant to our request to DoD to DA that
12 this is a tasker to do what we asked them to do. This goes back to
13 the exact same type of request that we've given an example to the
14 Court that was filed some time ago. And, of course, when we litigate
15 the due diligence argument of the defense's, this might come up, this
16 might not. But, bottom line is, even on what the defense has
17 provided, Your Honor, the key points--the actual routing slip from
18 the Headquarters DA form, the third boxed bullet, it has only
19 determined that no action was taken by Headquarters DA pursuant to
20 the 29 July 11 memo from DODOGC and then, before it, it explains what
21 the prosecutors are requesting. So, here's another example--or a
22 better example of prosecution going above and beyond its legal
23 obligations doing a due diligence search of even the DA files; Army

1 prosecutors asking the Department of Army to search their files for
2 these topics which come right off the same memo you have an example
3 of.

4 MJ: This says, "Provide an affirmative response with production
5 of records or a negative response by 23 April 2012." Has anybody
6 responded?

7 TC[MAJ FEIN]: Yes, Your Honor, we have received these sometime
8 in the last month--all the responses we have received as the
9 prosecution and we've started reviewing those as well.

10 MJ: Oh, that's what I'm asking.

11 TC[MAJ FEIN]: Yes, Your Honor.

12 MJ: You've got files that have been received-----
13 on the, Your Honor.

14 MJ: ----pursuant to this memorandum?

15 TC[MAJ FEIN]: Yes, Your Honor. Documents, Yes, Your Honor. I
16 mean, there are no centralized files in any Headquarters DA
17 organization about WikiLeaks or Private Manning other than Army CID
18 which the defense has already had or the other--the SECARMY 15-6 that
19 was done, directed by the Secretary of Defense--the Secretary of the
20 Army--that was already produced in discovery to the defense--three
21 military intelligence investigations that were produced to the
22 defense, two different CID investigations that have been produced to
23 the defense, one USF-I--U.S. Forces, Iraq 15-6 that's already been

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized.

Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

COPIES - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

ARRANGEMENT - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

- a. Errata sheet, if any.
- b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.
- c. Record of proceedings in court, including Article 39(a) sessions, if any.
- d. Authentication sheet, followed by certificate of correction, if any.
- e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.
- f. Exhibits admitted in evidence.
- g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.
- h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.